The Twelfth part of the

REPORTS

OF SIR

EDWARD COKE, Kt.

OF

Divers Reſolutions and Judgments given upon ſolemn Arguments, and with great Deliberation and Conference with the Learned JUDGES in Caſes of

LAW,

The moſt of them very Famous, being of the KING eſpeciall Reference, from the

COUNCIL TABLE,

Concerning the *Prerogative*; As for the digging of Salt-peter, Forfeitures, Forreſts, Proclamations, *&c.* And the Juriſdictions of the Admiralty, Common-Pleas, Star-Chamber, High Commiſſion, Court of Wards, Chancery, *&c.* And Expoſitions and Reſolutions concerning Authorities, both Eccleſiaſticall and Civill, within this Realm.

Alſo the Formes and Proceedings of Parliaments, both in *ENGLAND*, & *IRELAND*:

With an Expoſition of *Poynings* LAW.

Non eſt leges condendi authoritas, ubi non eſt obediendi neceſſitas, & è converſo.

With Alphabeticall Tables, wherein may be found the Principall Matters contained in this Booke.

LONDON,

Printed by *T. R.* for *Henry Twyford*, and *Thomas Dring*, and are to be ſold in *Vine-Court* Middle Temple, and at the *George* in *Fleetſtreet*, neer *Cliffords-Inne*, 1656.

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EDWARD COKE, Kt.

Divers Reſolutions and Judgments given upon Solemn

LAW

The moſt Learn'd Reports

CONCERNING

Concerning the Prerogative, Caſes for the Diſcipline of

Sale-pretences, Forfeitures, Thereof

Alſo the Forms and Proceedings of Parliaments both

EXPLANATORY:

With an Exposition of Statutes in LAW.

Printed by T. R. for E. Brewſter, Bartholomew Grave, and are to be

Sold in the Middle Temple, and at the Gun in Ivy-lane, and at the

Crown in Chancery-lane, 1658.

I Have perused this *Treatise*, Intituled the twelfth part of the *REPORTS* of Sir *Edward Coke* Knight; and I do, upon my reading thereof, conceive the same to be his *Collections*, and that the Printing of the same (containing very much good, and usefull learning) will be for the good of this Nation, and of the Professors of the *COMMON LAW*.

The second of *February*, 1655.

Edward Bulstrod.

Gen Res 13 May 42 Norman

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Paſch. 4. Jacobi *Regis.*

Ford *and* Sheldons *Caſe.*

IN an Information in the Exchequer Chamber for the King, againſt Thomas Ford Eſquire, Ralph Sheldon Eſquire, and divers others; The Caſe was thus.

Thomas Ford was at all times before the Statute of 23 Eliz. a Recuſant, and for money lent to Sheldon, ſome before 23 Eliz. and ſome after. Ford took a Recognizance in the names of other Defendants, and took alſo a Grant of a Rent-charge to them in Fee, with condition of Redemption by Deed indented: And the Recognizance was conditioned for performance of Covenants in the ſaid Indenture, and afterward the Statute of the 28 Eliz. was made, by which it was enacted, that if default of payment was made in any part of payment, (viz.) of 20 l. for every month, &c. And that then and ſo often the Queens Majeſty by proceſſe out of the Exchequer may take, ſecure, and enjoy all the goods, and two parts, &c. And after the ſaid Act, and before the 24. year of the Raign of the late Queen, Ford lent great ſumms of money to Sheldon, and for aſſurance of it, took a Rent-charge by Deed Indented, with condition of Redemption: And took alſo ſeverall Recogniſances in the names of other Defendants, for performance of Covenants, &c. as is aforeſaid, which Recogniſances did amount in all to the ſumm of 21000 l. all which were to the uſe of the ſaid Ford, and to be at his diſpoſition, and they were forfeited: And afterward, viz. 41 Eliz. Ford was convict of Recuſancy, and did not pay 20 l. per menſem, according to the Statute. And if upon all this caſe the King ſhould have the benefit of theſe Recognizances, was the queſtion.

And this caſe was debated by Counſell learned on both ſides in Court. And it was objected by the Counſell of Ford, that if the Recogniſances had been acknowledged to Ford himſelf, they ſhould not be forfeited to the King, for the Statute ſpeaks only of Goods. And Debts are not included within the word (Goods.) And for this, if the King grant all the Goods which came to him by the Attainder of I.S. the Patentee ſhall not have debts due to him, for that the Grant only extends to Goods in poſſeſſion and not to things in action. And this Act is a penall Law, and ſhall not be extended by equity.

2. It was objected that theſe Recogniſances were acknowledged good to perform Covenants in an Indenture for Rent-charge: And therefore ſavers of the realty, and are not within the intention of the ſaid Act, which ſpeaks only of Goods.

3. No Fraud or Covin appears in the Caſe; And then forasmuch as no Act of Parliament extends to this caſe, it was ſaid, that the Common Law doth not give any benefit to the King: For at the Common Law in far ſtronger Caſe, if Ceſtuy que uſe had been attaint of Treaſon; this uſe forasmuch

as it was but a truſt and confidence, of which the Law did not take notice, it was not forfeited to the King, and could not be granted: And if an Uſe ſhall not be forfeited, of which there ſhall be a Poſſeſſio fratris, &c. and which ſhall deſcend to the Heir, A multo fortiori, a meer truſt and confidence ſhall not be forfeited.

4. It was objected, that if the Forfeiture in the caſe at the Bar accrues to the King, by the Statute of 28 Eliz. it ought to be by force of this word (Goods:) But that ſhall not be without queſtion in this caſe. For Ford hath not any Goods, but only a meer truſt and confidence, which is nothing in conſideration of Law.

And the Court cannot adjudge that theſe Recogniſances belong to the King by equity of the ſaid Statute, becauſe it is penall: Alſo one Recogniſance was taken in the names of ſome of the other Defendants, before the Statute of the 28 Eliz. which gave the Forfeiture.

And for that reaſon, it cannot be imagined that it was to defeat the King of a Forfeiture, which then was not in Eſſe, but given afterwards.

As to the firſt objection, it was anſwered and reſolved by all the Barons, and by Popham chief Juſtice of England, and diverſe others of the Juſtices, with whom they conferred, that if the Recogniſances had been acknowledged to the party himſelf, that they were given to the King without queſtion for perſonall Actions, are as well included within this word, Goods, in an Act of Parliament, as Goods in poſſeſſion. But inſomuch as by the Law things in action cannot be granted over for that cauſe by generall grant (things in action (which only he may grant by his Prerogative) without ſpeciall words paſſe not for his Prerogative, can never paſſe by general words. And it was affirmed, that ſo it had been reſolved before, that is to ſay, That Debts were forfeited to the King by the ſaid Act of the 28 Eliz. And where the Statute ſaith, Shall take, ſeiſe, and enjoy all the Goods, and two parts, &c. And although a Debt due to a Recuſant cannot be taken and ſeiſed, yet inaſmuch as there is another word, viz. Enjoy, the King may well enjoy the Debt; And by proceſſe out of the Exchequer levy it, and ſo take and ſeiſe, refers to Goods, and two parts of Lands in poſſeſſion.

As to the ſecond Objection, it was originally for the loan and forbearance of mony. And as well the Recogniſance as the Annuity were made for the ſecurity of the payment of the ſaid money: Alſo when the Recogniſances are forfeited, they are but Chattels perſonall.

As to the third Objection, there was Covin apparant, for when he was a Recuſant all time after that Statute of the 23 Eliz. and for that chargable to the King, for the forfeiture given by the ſame Act, it ſhall be intended that he took theſe Recogniſances in the name of others, with an intent to prevent the King of levying of the Forfeiture: And all the Recogniſances which were taken in other mens names after the ſaid Act, ſhall be preſumed in Law to be ſo taken, to the intent to defeat the King of his Forfeiture: True it is, that an Uſe or Truſt ſhall not be forfeited for Treaſon or other offence by the Common Law, becauſe it is not a thing of which the Common Law taketh any notice, for that Ceſtuy que uſe, hath not Jus in re, nor jus ad rem, but by the Common Law, when any act is done with an intent and purpoſe to defraud the King of his lawfull duty, or Forfeiture by the Duty, or Forfeiture by the Common Law, or Act of Parliament, the King ſhall not be barred of his lawfull Duty and Forfeiture, Per obliquum, which belongs to him by the Law, if the Act was made De directo.

And for this, if a man Out-lawed buy Goods in the names of others, the King ſhall have the Goods in the ſame manner, as if he had taken them directly in his own name: So if any Accountant to the King purchaſe Lands in the names of others, the King ſhall ſeiſe thoſe lands for mony due unto him.

And

And this appears by the caſe of Walter Chirton, Trin. 24. Ed. 3. Rot. 4. in Scaccario, where the caſe was, that Walter de Chirton was indebted to the King, 1800 l. which he had received of the Kings Treaſure, and did purchaſe certain Lands with the Kings money; and by Covin had cauſed the Vendor to enfeoff his Friends in Fee to defraud the King, and notwithſtanding took the Profits himſelf: And afterwards Walter Chirton was committed to the Fleet for the ſaid Debt. And all the matter was found by Inquiſition, and by Judgment the Land was ſeiſed into the Kings hands Quouſque; for in caſe of the King, an act done by Covin, Per obliquum, ſhall be equall to an act done De directo, to the party himſelf, For, Rex fallere non vult, falli autem non poteſt: See another Preſident, Trin. 24. Ed. 3. Rot. 11. Ex Recum Regis, where one Thomas Favell was Collector of Tithes and Fifteenths, and was ſeiſed of certain Lands in Fee-ſimple, and having divers Goods and Chattels, Die intromiſſionis de collectione & levatione, Of Tenths and Fifteenths, Languidus in extremis alienavit levementa ſua & bona & catalla diverſis perſonis, And died without Heir or Executor. In this caſe by the Prerogative of the King, Proces was made as wel againſt the Ter-tenants, as againſt the Poſſeſſors of the Goods and Chattels, although they were not Executors, &c. Ad computandum pro collectione predicta, & ad reſpondendum & ſatisfaciendum inde Regi, &c. Et hoc per Cancellarium Anglicé & Capitales Juſticiarios Anglice & aliorum Juſticiariorum utriuſque Banci quod acta bene.

As to the fourth Objection, Non refert, whether the duty do accrue to the King by the Common Law, or by Statute; but be it the one way or the other no Subterfuge that the party can uſe, can defeat or defraud the King: And although one of the Recogniſances was taken before the Statute of 28 Eliz. yet that was to his uſe, and for that it is in the nature of a Chattell in him, and was taken in the names of others to prevent the Queen of her Forfeiture, which ſhe might have by the Act of 23 Eliz. And although Ford was not convict untill 41 Eliz. that is not materiall, for at all times before that he was ſubject to a Forfeiture for his Recuſancy.

Paſch. 4. Jac.

In the Chancery, 27. *Junii*, 29 *Eliz. Inter Johannem Dominum S. John de Bletro querentem & Decanum & Capitalum Gloceſtriæ Defendentes.*

Appropriation, Procedendo denied in Chancery.

The caſe was, that the Plaintiff brought a Quare impedit in the Common Pleas, againſt the Defendant, for the Church of Penmark, in the County of Glamorgan, which Suit was ſtaid by Ayde-prayer, and the Record was removed into the Chancery, upon which the Plaintiff moved for a Procedendo, and upon Oyer of Cauſe, before Sir Thomas Bromley Lord Chancellor, in the preſence of Sir Gilbert Gerrard Maſter of the Rolls, and Shute and Wyndham Juſtices, and Popham Attorney, and Egerton Solicitor of the Queen, the Plaintiff ſhewed a Gift in Tail of the ſaid Advowſon made to his Anceſtor, in the 18 R. 2. and a Verdict for his Anceſtor in the 12 H. 8. and a Preſentation by his Grandfather to the ſaid Church, of a Clerk who was admitted, inſtituted, and inducted, with poſſeſſion for certain years, and divers other matters to prove the Title of the Plaintiff, yet for this, that the Defendant and thoſe from whom he claims, time out of mind, had had the poſſeſſion of the Parſonage as Impropriate (ſaving interruption for ſome ſmall time.) And for this that it ſhall be a dangerous preſident to the Queen and others, Owners of Impropriations, being able to maintain

tain the Appropriations to be perfect in all points, and circumſtances which are requiſite to the making of an abſolute and compleat Impropriation, the Appropriations being made of ancient time.

It was reſolved by this Court of Chancery, by the advice of the Juſtices and Counſell learned of the Queen, that no Procedendo in loquela ſhould be granted.

Vide Ridley fol. 153, 154. the beginning of Appropriations and of Annuities to be diſcharged of Tithes; It was after *Benedict* who was the Inſtitutor of Monks, *&c.* And note there the reaſon of Prayer being preferred before Preaching.

Vide 155. *ibid.* That the Saxon Kings appropriated eight Churches to the Monaſtery of *Croyland*, as appears by *Ingulphus* who was Abbot there.

Trin. 37 *Eliz.* In the Exchequer Chamber.

Inter Thomam Crimes & alios querentes & Henricum Smyth Defendentem.

Endowment is preſumed when a Vicaridge hath long continued.

THe Caſe was ſuch, The Abbot of Sulby; held the Parſonage of Lubbenham in the County of Leiceſter, to his proper uſe, which as a Parſonage Impropriate came to King H.8. by diſſolution of Monaſteries, Anno 31. H.8. who in the 37. year of his Raign, granted it in Fee-farm, under which Grant the Plaintiff claimeth, the Defendant had obtained a preſentation of the Queen, and to deſtroy the ſaid Impropriation did ſhew the Originall Inſtrument of it, Anno 22. Edw. 4. with Condition in it a Vicaridge ſhould be competently endowed, and alledged that the ſaid Vicaridge was never endowed. And for that very cauſe the Impropriation was void, and in truth there was no Inſtrument, nor direct proof of any endowment of the Vicaridge.

But for this that the ſaid Rectory was for all the time of the Impropriation ſuppoſed, reputed, and taken to be appropriate, and by all that time a Vicar preſented, admitted, inſtituted, and inducted as a Vicar rightfully endowed, and paid his Firſt-fruits, and Tenths.

It was reſolved by all the Court, that it ſhall be preſumed that the Vicaridge in reſpect of continuance was lawfully endowed, for that Omnia preſumuntur ſollemniter eſſe acta. And it ſhall be of dangerous preſident to examine the Originals of Impropriations of any Parſonages, and the endowments of Vicaridges, for that the Originals of them in time will periſh. And ſo it was decreed for the Plaintiff.

Hill 4. Jac. Regis.

Inter William Bedle *gen. quer.* & Thomam Beard *Clericum* Jacobum Wingfeild *militem* & Marium Wingfeild *Defend.*

Chancery. *Impropriation* not void becauſe of an Eſtate-tail in the Patron, Grantor, *&c.*

THe Caſe was thus. Anno 31. Ed. 1. The King being ſeiſed of the Manor of Kimbolton, to which the Advowſen of the Church of Kimbolton was appendent, by his Letters Patents granted the ſaid Manor, with the Appurtenances, to Humfrey de Bohane Earl of Hereford, in Taile generale, Humfrey de Bohane the Iſſue in Tail, by his Deed, in the 4. of Ed. 3. granted the

the ſaid Advowſon then full of an Incumbent to the Pryor of Stoneley, and his Succeſſors: And at the next avoidance they held it, In proprias uſus; And upon this Appropriation made; Concurrentibus his quæ in jure requiruntur, after the death of the Incumbent, the ſaid Pryor and his Succeſſors held the ſaid Church to their proper uſe, untill the diſſolution of the Monaſtery, in the 27 H. 8. the ſaid Manno descended to Edward, Duke of Buckingham, as Iſſue to the ſaid Eſtate tail. And the Reverſion deſcended to King H.8. The Duke in the 13 H. 8. was attaint of high Treaſon, 14 H. 8. The King granted the ſaid Manno, &c. with all Advowſons appendent, &c. to Richard Wingfield, and the Heirs Males of his body, 16 H.8. It was enacted by Parliament, that the ſaid Duke ſhall forfeit all Mannors, &c. Advowſons, &c. which he had, &c. in 4 H.8. The King, Anno 37. H.8. granted and ſold for money the ſaid Rectory of Kimbolton, as impropriate in Fee, which by mean conveyance came to the Plaintiff for 1200 l. An. 37. Eliz. Beard the Defendant did obtain a Preſentation of the Queen by Lapſe, pretending that the ſaid Church was not lawfully impropriate to the ſaid Pryor of Stoneley.

1. For this, that Humfrey who did grant it to the Pryor, had nothing in it, for that it did not paſſe to his Anceſtor by theſe words (Mannerium cum pertinentibus.)

2. Or for this, that he had no more then an Eſtate in tail, and then by his death his Grant was void.

But it was reſolved by the Lord Elleſmore, Lord Chancellor, with the principall Judges, and upon conſideration of Preſidents, that the Plaintiff ſhall enjoy the ſaid Rectory. For although that by any thing which can now be ſhewn, the impropriation is defective (for by nothing which now appears, the Iſſue in tail had any thing in the Advowſon at the time of his Grant to the ſaid Pryor, for that the Advowſon did not paſſe by the Grant of the King, by thoſe words (Cum pertinentibus) yet it ſhall be now intended in reſpect of the ancient and continuall poſſeſſion, that there was a lawfull Grant of the King to the ſaid Humfrey, who granted in Fee, ſo that he might lawfully grant it to the ſaid Pryory, Omnia preſumitur ſollempniter eſſe acta) And all ſhall be preſumed to be done, which might make the ancient Impropriation good: For Tempus eſt edax rerum; And Records and Letters Patents, and other Writings, either conſume or are loſt, or imbeſiled: And God forbid, that the ancient Grants and Acts ſhould be drawn in queſtion, although that they cannot be ſhewn, which at firſt were neceſſary to the perfection of the thing: And if the Impropriation had been drawn in queſtion, in the life time of any of the parties to it, they might have ſhewn the truth of the matter: But after the death of all the parties, and after ſo many ſucceſſion of ages. In all which the ſaid Church was eſteemed and allowed, to be rightfully impropriate.

If any objection or exception ſhould now prevail, the ancinet and long poſſeſſion of the Owners of the ſaid Rectory ſhould hurt them. For if theſe Objections or exceptions, had been made in the lives of the parties, without any queſtion they had been anſwered, or otherwiſe in ſo many ſucceſſions of ages it would have been impeached or impugned.

Mich. 4. Jac Regis.

Forfeiture. Treason.

Hill. 43. Eliz. A Case was moved to all the Justices, Tenant in tail before the Statute of 27 H. 8. made a Feoffment in Fee, to the use of himself and his Wife in tail: And after the Statute of 27 H. 8. is made, the Husband was attaint of high Treason, 31 H. 8. and died, the Wife continued in possession and died, their Issue enter, and dye, and this descends to his Issue: And all this especiall matter is found by an Office.

The question was, if the Issue in tail, or the King, shall have the land; And it was objected that the right of the ancient Estate-tail cannot be forfeited for divers causes; Viz.

1. For this, that the ancient Estate was discontinued, and such right of action cannot be forfeited; As it is agreed in the Marquesse of Winchesters case.

2. The Feoffor himself as this case is, had not any right to the ancient Estate-tail (for by his Feoffment his right was utterly gone) was attaint, and he cannot forfeit what he hath not.

3. The Issue in tail is remitted to that ancient right which cannot be forfeited: And the new Estate-tail which was derived under the discontinuance, and which may be forfeited by the Statute of the 26 H. 8. cap. 13. is continued; and by Act in Law, Viz. The discent and remitter avoided: And the Estate of the King may be divested out of the King by remitter, which is an Act in Law. As if discontinuee of Tenant in tail, grant the land to the King, his Heirs and Successors: And the King grant the land to Tenant in tail for life, the remainder to his Son and Heir apparent for life, Tenant for life dies, the Issue by Act in Law is remitted: And by this all the Estate of the King which he hath under the discontinuance, is divested out of him, and with this accords Plow. Com. 489. in Nicols Case, so in the case at the Bar, the new Estate under the discontinuance which was forfeitable is now purged by the Remitter of that ancient right, and the Title which the King hath, by that defeated and avoided.

Resolved that in this case the Issue in tail was barred: And that which had been said, answered, confessed, and avoided. For true it is, that right of Action cannot be given to the King, by the Statute of the 26 H. 8. But when Tenant in tail discontinues his Estate to the use of himself in tail, and after is attaint of Treason, now by the Statute of 26 H. 8. he doth not forfeit only the new Estate in tail, but by this the right of the ancient Estate is barred for ever: For the words of the Statute are, That every Offendor being lawfully convict of high Treason, &c. shall forfeit to the King, his Heirs and Successors, all such Lands, Tenements, and Hereditaments, which any such Offendor shall have of Estate of Inheritance: By which words, if there was not any saving, the right of the ancient Estate-tail was bound, then the saving is, saving to every person, &c. (other then the Offendors, their Heirs, and Successors, and such persons as claim to any of their uses) all such rights, so that the Offendor and his Heirs are excluded out of the saving: For Heirs includes all manner of Heirs, and for this they are bound by the body of the Act.

And so note a diversity between a naked right of Action which is not forfeitable, and an Estate of Inheritance which is forfeitable, coupled with an ancient right for which the forfeiture of the Possession is barred

by

by the ſaid Act. And when all this appears by Office, then is the Iſſue in tail notwithſtanding the Remitter barred by force of the ſaid Act of Parliament, to which all are parties or privies: And it is not like to the Caſe in Plowdens Com. of Remitter, for this is no bar of an ancient Right.

Paſch. 4. Jac. Regis.

AT this Parliament held, Paſch. 4. Jac. Regis. It was moved and ſtrongly urged at a Grand Committee of Lords and Commons in the Painted-Chamber, that ſuch Biſhops as were made and created after the firſt day of this Seſſion of Parliament were not lawfull Biſhops.

1. Admitting that they were Biſhops, yet the manner and form concerning their Seals, Stiles, Pracelle, and Proceedings in their Eccleſiaſticall Courts were not conſonant to Law: And their reaſon was for this that is provided by the Statute of 1 Ed. 6. cap. 2. that from thenceforward Biſhops ſhould not be Elective, but Notatively by the Letters Patents of the King: And that forasmuch as at this day all Biſhops are made by Election, and not by Donation of the King, according to the Act, for this reaſon, if the ſaid Act of 1 Edw. 6. be not in force from the time that it took its effect, the Biſhops are not lawfull.

2. By the ſaid Act of 1 Ed. 6. it is further enacted, that all Summons, Citations, and Procelle in Eccleſiaſticall Courts, ſhall be made in the name and ſtile of the King, and that their Seals ſhall be engraven with the Kings Armes, and that Certificates ſhall be made in the name of the King. And whereas the ſaid Act of 1 Edw. 6. was repealed by a ſpeciall Act, 1 Mariæ Parliam. 1. cap. 2. Seſſ. 2. And the ſaid Act 1 Mar. is now repealed by a branch of an Act, 1 Jac. cap. 25. verſus finem, for by the ſame Act it is enacted, that the ſaid Act of 1 Mar. ſhall be expreſſly repealed: The ſaid Act of 1 Edw. 6. is now in force.

For when an act of Repeal is repealed, the firſt Act repealed is revived, &c. as appears in Spencers Caſe, 15 Edw. 3. Title Petition 2.

And for this it was concluded that the ſaid 1 Edw. 6. cap. 2. being in force, by a conſequence all Biſhops made after the Act 1 Jac. were not lawfull Biſhops: And for that their ſtile and proceeding after the ſame act in the name of the Biſhop, and not in the name and under the Seal of the King; for this cauſe the Proceedings were unlawfull, Quia non obſervata forma infertur adnullatio actus. And theſe were matters of great import and conſequence.

As to theſe Objections, upon conſideration had of them by commandment of the King, it was anſwered and reſolved by Popham chief Juſtice of England, and Coke Attorney of the King, and afterwards affirmed by the chief Baron, and the other Juſtices then attendant to the Parliament, upon good advice and conſideration, that although the ſaid act 1 Mar. be repealed, that yet the ſaid act 1 Edw. 6. cap. 2. for other cauſes is not now in force, but remains repealed, yet true it is, that when an act of Repeal is repealed, the firſt act as hath been ſaid ſtands in force, and is implicitè revived. But to wit, that the ſaid act, 1 Edw. 6. was repealed, annulled, and annihilated by three ſeverall acts of Parliament: And as a man which is bound by three ſeverall Bonds, although he break one or two of them, yet the third which remains whole will bind him: So when the

the words of three severall acts repeal or annull, or for ever act, although that one or two of the Acts of Repeal or Annullation are repealed, yet the other which remains in force annis the first act: First of all, the act of 1 Mar. expressly repealed, 1 Ed. 6. 2. the act of 1. & 2. Phil & Mar. hath sufficient words to repeal and annull the said act of 1 Ed. 6. as to Stile, Seal, & Processe, Court Christian, although that the act of 1 Mar. Parlia. 1. had never been made, the words of which act are, and the Ecclesiasticall Jurisdictions of the Arch-bishops, Bishops and Ordinaries to be in the same estate for Processe of Suits, punishment of Crimes, and execution of Censures of the Church, with knowledge of causes belonging to the same, and as large in these poynts as the said Jurisdiction was, An. 20 H. 8. And although that the said act of 1 Mar. hath by expresse words repealed the said act of 1 Ed. 6. and for that it may be said, that the said act of 1. & 2. Ph. Mar. could not repeal that which was repealed before; yet it was resolved that now inasmuch, that the repeal which the act of 1 Mar. operats is now annulled and repealed it followes, that if now the act of 1. & 2 Phil. & Mar. be in force, or if the said act of the 1 Eliz. cap. 1. operate only as the said act of the 1. & 2. Phil & Mar. it makes that the act of 1 Ed. 6. cannot also stand, Quia leges posteriores priores contrarias abrogant. But it was objected that the said act of the first and second of P. & M. is repealed by the Statute of 1 Eliz. 1. And it was answered and resolved that it is enacted by the act of the 1 Eliz that the said act of 1. & 2. Phil. & Mar. and every branch and article of it (other then for such branches as be hereafter expressed) shall be repealed: and after by the other branch of 1 Eliz. It is enacted, that all other Lawes, Statutes, and every branch therof repealed and made void by the said act of 1. & 2. of Phil. & Mar. and not in this act especially mentioned and revived, shall remain and be repealed and void, as the same were before the making of the act: But the act of 1 Ed 6. was as hath been said repealed by the act 1. & 2. Phil. & Mar. and the act of 1 Ed. 6. is not revived specially by the act 1 Eliz. and for this that the said act of 1 Ed. 6. remains repealed as it was before the second act, which hath sufficient words to repeal and annul the act of 1 E. 6. for both the objections was, the Statute of 1 Eliz cap. 1. for this remains the act of 23 H. 8. cap. 20. and further enacts, that it shall stand in full force and effect to all intents constructions and purposes. And by the said act of the said 25 H. 8. cap. 20. It is provided that every avoidance of any Arch-bishop or Bishop, the King, his Heirs and Successors may grant to the Prior and Covent, and the Dean and Chapter, &c. a license under the great Seal, as of old time hath been accustomed to proceed to an Election of an Arch-bishop, or Bishop, with a Letter missive containing the name of the person, which they shall elect and choose, &c. And further by another branch in the same act, it is enacted, that every person chosen elected, and invested, and consecrated Arch-bishop or Bishop, according to the form and effect of this act, shall do and execute every the thing and things, as any Arch-bishop or Bishop of this Realm, without offending of the Prerogative Royall of the Crown, and the Lawes and Customes of the Realm might at any time heretofore do: And these two branches answers to both the Objections; Viz. For the manner of Election and consecration of Arch-bishops and Bishops, and also for the making and execution of all things which belongs to their authority, as any Arch-bishop or Bishop might have done before the making of the said act of 25 H. 8. within which words, the Stile and Seal that their Court, and the manner of their proceedings are included. And now the act of 1 Eliz. cap. 1. hath revived the act of 25 H. 8. and enacted that the same shall stand and be in full force and strength,

ſtrength, to all intents, conſtructions, intents, and purpoſes, from whence it followes, that the act of 1 Eliz. reviving the 25 H. 8. hath repealed the act of 1 Ed. 6. for in an act which was repealed, the Repeal is void and adnulled: And this was the principall cauſe of the ſaid reſolution, for both the points upon which the ſaid doubts were conceived. And it is to be obſerved that the intention of the ſaid Repeal by the act of 10 Jac. was to repeal the ſaid act of 1 Mar. As to an act made 5 Ed. 6. by which it is enacted that the Patrimony of all and every Prieſt, and other Eccleſiaſtical and Spiritual perſons ſhall be adjudged, deemed, and taken, for juſt, true, and lawfull Patrimony, to all intents, conſtructions and purpoſes: And that all Children born in ſuch Patrimony ſhall be deemed and adjudged, to all intents, conſtructions, and purpoſes, to be born in lawful Patrimony, & be legitimate and inheritable, to Lands, Tenements, & Hereditaments; and that they ſhall be Tenant by the Courteſie, and Tenant in Dower, &c. ſo that now the ſaid act of 1 Mar. being repealed, the ſaid act of 5 Ed. 6. cap. 10. is now in force, and the Patrimony of all Eccleſiaſticall perſons and their Iſſue, lawfull and legitimate, to all intents, conſtructions, and purpoſes, by which the doubt amongſt the vulgar is well explained.

But the Repeal of all the act of 1 Mar. by which divers other Statutes were repealed, being repealed generally without any reference as to the ſaid act of 5 Ed. 6. according to the intention of the Parliament Sub ſilentio, made the ſaid ſcruple. And yet as it appears by this reſolution upon manifeſt and direct matter, no inconvenience of the generall Repeal of the ſaid act 1 Mar. doth inſue.

And note by our Books it appears, that if a Deacon or Prieſt take a Wife, the marriage was voidable by divorce, and not void, for they had not vowed Chaſtity: And for that, if they had Iſſue, and one of them dyes, the Iſſue ſhould be inheritable. But if a Munk, or Nun, or other Religious perſon which had made a Vow of Chaſtity, had married, this marriage is void: And this doth appears 5 Ed. 2. Title Non-ability, 26. 19. H. 7. Title Baſtardy 33. 21. H. 7. 39. b.

Mich. 4. Jac.

Tin pre-emption in *Cornwall.*

IT was reſolved in the Star-chamber in the ſame Term, that the King had not the Emption of Tinn in Cornwall by any Prerogative, for Stanni fodina nec plumbi fodina, &c. or other ſuch baſe Mynes do not belong to the King by his Prerogative, but to the Subject which is Owner of the Land: But the Emption of Tinn in Cornwall, belongs to the King as an ancient Right and Inheritance due to the King, as well of Tynn in the Land of the Subject as in his proper Demeines: And although that now a reaſon cannot eaſily be rendred of things done before time of memory, yet it may well be that all the Land of the County was the Demeins of the King: And upon Grant of the Land the King reſerved the Mynes to himſelf, for theſe Mines are of great antiquity, as appears after Ex Diodoro ſiculo, Et certo certius eſt, that all the land in England is derived mediatly or immediatly from the Crown, for all Land is held mediatly, or immediatly of the King, and for this reaſon ſuch a Proffit a Prender may have a reaſonable commencement: And where uſage hath allowed it to the King, it doth belong to him; True it is, that all the County of Cornwall was within the Foreſt of the King: and that

it was diſafforeſted by King John, as appears by Camden. And what conſideration the County gave for it to the King concerning Tinn cannot now appear, but this appears plainly, that before the 33 Edw. 1. all the Tinn in Cornwall and Devon alſo, to whomſoever the Land belonged, appertained to the King: And this is proved by divers expreſſe Records, and by an antient Charter of King John, amongſt the Records of the Biſhop of Exeter. In hæc Verba Johannes dei gratia Rex Angliæ, &c. Omnibus baliis ſalutem, Sciatis quod intuitu dei & pro ſalute animæ noſtræ, &c. dedimus conceſſimus ac preſenti charta noſtra confirmavimus deo & Eccleſiæ beati Petri Exon & venerabili patri Domini Simoni Exon Epiſcopo & ſucceſſoribus ſuis Exon epiſcopis, decima de antiqua firma ſtanni in Com. Devon, & Cornubiæ: Habendum ſibi & ſucceſſoribus ſuis cum omnibus libertatibus & liberis conſuetudinibus ad eam pertinentibus per manus illius vel illorum qui ſtannaria haberint in cuſtodia, &c.

Paten, 1 H. 3. memb' 4. Rex Roberto de Courtney ſalutem mandamus vobis quod ſine dilatione & difficultate aliqua, habere facietis Dominæ Johannæ Reginæ matri noſtræ, ſtannaria com. Devon. cucunne & omnibus pertinent.
Teſte Will. Mariſcallo, &c.

4 H. 3. Fines, 5 H. 3. Rex conceſſit Johanni filio, Richardi ſtannaria in Cornubia reddendo 1000. marks.

10 H. 3. memb. 9. Rex, &c. Sciatis quod Conceſſimus Richardo dilecto fratri noſtro, ſtagnariam noſtram Cornubiæ, cum omnibus purtinentibus, With Prohibition that none tranſport any Tinn without licenſe of the ſaid Richard.

10 Ed. 2. Inqui. 2. numero 29. For this that Decima ſtagnariæ noſtræ in Com. Cornubiæ & Devon. Do belong to the Biſhop of Exeter; It was therefore commanded to the ſaid Sheriff to value the ſaid Stannary, ſo that the Biſhop may have that which to him doth belong, Viz. Vera decima Stannariæ; In which note Stannariæ noſtræ.

33 Ed. 1. grant al Finers, vide Plow. com. Note there are two ſeverall Charters, both bearing date 10. Aprilis An. 33 Ed. 1. The one Ad emendationem Stannariarum noſtrarum in Com. Devon: And the other Ad emendationem Stannariarum noſtrarum in Com. Cornubiæ: Conceſſimus eiſdem Stannatoribus quod fodere poſſunt ſtannum & turbas ad ſtannum fundendum ubique in terris noſtris, & vaſtis noſtris, & aliorum quorum cunque in Comitatu predicto; Et aquas, & aquarum Curſus divertere ubi & Quoties opus fuerit, &c. ad Fundaturam Stanni ſicut antiquitus Conſuevit, ſine impedimento noſtro ſeu aliorum quorum cunque: Ac quod omnes Stanatores noſtri prædicti totum ſtannum ſuum ponderatum, &c. licite vendere poſſunt Cuicunque voluerint faciendo nobis & heredibus noſtris Cunageum & alias Conſuetudines debitas & uſitatas niſi nos vel heredes noſtri ſtannum illum emere voluerimus.

35 Ed. 1. in the Treaſury. The liberty granted to Tinners by the ſaid Charter, 33 Ed. 1. granted to all Tinners, which Charter of 33 Ed. 1. made to the Tinners of Devon. was confirmed De verbo in verbo, An. 4 Ed. 2. and was alſo confirmed, An. 1. & 17 Ed. 3.

Rot. Almaine, An. 12 R. 2. part 1. De adviſamento Conſilii noſtri ordinavimus quod ſtannum in Com. Cornubiæ & Devon ad opus noſtrum Capiatur pro defenſione regni noſtri, &c. Et ad partes marinas Celeriter mittatur, in auxilium & ſupportationem o-

norum

horum noſtrorum, &c. Ita quod hominibus quibus ſtannum illud Capi Contigerit de pretio ejuſdem ſtanni ad certos terminos ſoluend ſufficiens ſecuritas per nos fiat, Aſſignavimus vos conjunctim & diviſim ad capiendum ad opus noſtrum totum ſtannum in Comitatu predicto Cunitum & etiam Cuniend cum cunitum fuerunt. And there is alſo authority given to take Carriages Tam per Naves & battellos in Portibus Com. predict. exiſtent quam Carrecta & alia Carriagia quæcunque pro ſtanno illo uſque ad Portum Southampton Cariandum: And commandment given to the Sheriffs, Quod ipſe ſumptis pro Carriagiis & aliis neceſſariis in hæc parte inveniendis de exitibus ballivarum ſuarum ſolvant.

Edward the black Prince deceaſed (and the King under the great Seal confirmed) the ſame year) to Tydman of Limberge, Cunageum ſtannariæ totius Ducatus Cornubiæ pro tribus annis. Nec non emptionem totius ſtanni, tam infra dictum Ducatum Cornubiæ quam Com. Devon foſſi & fodendi quod vendi debeat pro fine mille marcarum & reddendo tria mille & quingentas marcas. 21 Ed. 3. ex Rot. Patent.

The ſaid Charter was confirmed at the Suit of the Tinners, 8 R. 2. to the Tynners in Cornwall. 8 R. 2.

The ſaid Charter of 33 Ed. 1. to the Tinners of Devon, was confirmed at the Suit of the Tinners, Anno, 1 Ed. 4. 1 Ed. 4.

It was alſo at their Suit confirmed, 3 H. 7. to the Tinners of Devon. 3. H. 7.

Vide the Statute of the 11 of H. 7. by which it is ordained that a certain weight and meaſure ſhall be uſed throughout all England; Provided alwaies, that this act extend not, nor be in any wiſe hurtfull, or prejudiciall to the Prince within the Dutchy of Cornwall, or any weights belonging to the Coynage of Tinn within the Counties of Cornwall and Devon, but that ſuch Weights ſhall be uſed, &c. as hath been accuſtomed. 11. H. 7. cap. 4.

The King gave Commiſſion and power to Gilbert Brockhouſe, to have pre-emption for and in the name of the ſaid King of all white Tinn within Cornwall and Devon, for one and twenty years yelding three thouſand marks Rent. 26 April, 7 E. 6 le Roy mouſt in Ian. enſuant, &c.

Note the ſtile of the ſaid Courts of Stannaries in Cornwall and Devon, at all times, and during all the Raign of Queen Elizabeth, Mar. Ed. 6. H. 6. H. 7. Ed. 4. H. 6. H. 5. H. 4 &c. Magna Curia Domini regis Ducatus ſui Cornubiæ apud Cockereaton in Com. Devon Johane Comite Bedford Cuſtode Stannariæ dicti Domini regis & Reginæ in dicto Comitatu Devon: By which it may appear, that at the firſt all the Tinn in the County of Cornwall and Devon belonged to the King: And after the ſaid Charters of 33 Ed. 1. the King may buy all if he will.

And note the antiquity of Tinn Mynes in Cornwall, Vide Camden in Cornwall, 121. extremam Promontoriam quod oræam vergilio incumbit, Diodoro ſiculo dicit Balerium: Et vide Diodorum ſiculo lib. 5. c. 8. fol. 142. b. Brittani qui juxta balerium promontorium incolunt Mercatorium uſu qui eo ſtanni, &c. Camden in Cornwall 21. Diod. ſiculus.

And as for that, which was objected that the Charter of 33 E. 1. extends only to Tin within the Land of the King himſelf: It was reſolved that by the ſaid clauſe (Fodere & fundere ſtannum terris noſtris & vaſtis noſtris & aliorum

rum quorumcunque, &c. Sicut Antiquitas Consuevit, &c. It is manifest that the King hath all the Mine, as well in the Land of the Subject as in his own proper Land.

2. It shall be absurd that the King shall reserve the emption of his own Tin.

3. The King grants Stannatoribus nostris, divers Liberties and Immunities which are all enjoyed as well by the Tinners in the Lands of the Subject, as by those in the Lands of the King, &c.

In the Session of Parliament held in *Decemb. An.* 4. *Jac. Regis.*

Prerogative of the King in Saltpeter.

ALL the Justices, Viz. Popham chief Justice of England, Coke chief of the Common Pleas, Fleming chief Baron, Fenner, Searle, Yelverton, Williams, and Tanfield, Justices, were assembled at Serjeants Inn, to consult what Prerogative the King had in digging and taking of Saltpeter to make Gun-powder by the Law of the Realm; And upon conference between them, these points were resolved by them all, Una voce.

1. Point.

That although the invention of Gun-powder was devised within time of memory, Viz. In the time of R. 2. yet in as much as this concerns the necessary defence of the Realm, he shall not be driven to buy it in forraign parts; and forraign Princes may restrain at their pleasure, in their own Dominions: And so the Realm shall not have sufficient for the defence of it, to the perill and hazard of it: And therefore insomuch as Saltpeter is within the Realm, the King may take it according to the Limitations following, for the necessary defence of the Kingdom.

2. Point.

Although the King cannot take the Trees of the Subject growing upon his Freehold and Inheritance, as it was now lately resolved by us the Justices of England. And although he cannot take Gravel in the Inheritance of the Subject, for reparation of his houses, as the Book is in 11 H. 4. 28. Yet it was resolved that he may dig for Saltpeter, for this that the Ministers of the King who dig for Saltpeter, are bound to leave the Inheritance of the Subject in so good plight as they found it, which they cannot do if they might cut the Timber growing, which would tend to the disinheritance of the Subject, which the King by Prerogative cannot do; for the King (as it is said in our Books) cannot do any wrong.

And as to the Case of Gravel, for reparation of the houses of the King, it is not to be compared to this case, for the case of Saltpeter extends to the defence of the whole Realm, in which every Subject hath benefit, but so it is not in the case of the reparation of the Kings houses: And for this it is agreed in the 13 H. 4. and other Books that the King may charge the Subject for Purage of a Town, to which the Subjects were charged in the time of insurrection or War, for safety: And so for Portage, for this that he which is charged hath benefit by it, but the King cannot charge the Subject for the making of a Wall about his own house, or for to make a Bridge to come to his house, for that doth not extend to publike benefit: But when Enemies come against the Realm, to the Sea Coast, it is lawfull to come upon my Land adjoyning to the same Coast, to make Trenches or Bulwarks for defence of the Realm, for every Subject hath benefit by it. And for this by the Common Law, every man may come upon my

my Land for defence of the Realm, as appears 8 Ed. 4. 23. And in such case on such extremity they may dig for Gravell, for the making of Bulwarks, for this is for the publick, and every one hath benefit by it, but after the danger over, the Trenches and Bulwarks ought to be removed, so that the Owner shall not have prejudice in his Inheritance: And for the Common-wealth, a man shall suffer damage, as for saving of a City or Town, a House shall be plucked down if the next be on fire; And the Suburbs of a City in time of War for the common safety shall be plucked down, and a thing for the Common-wealth every man may do with bringing an action, as is said in the 3 H. 8. fol. 15. And in this case the Rule is true. Princeps & Respublica ex justa Causa possunt rem meam auferre.

It was resolved that this taking of Saltpeter is a purveyance of it for the making of Gun-powder, for the necessary defence and safety of the Realm. And for this cause, as in other Purveyances, it is an incident inseparable to the Crown, and cannot be granted, demised, or transferred to any other, but ought to be taken only by the Ministers of the King (as other Purveyances ought) and cannot be converted to any other use then for the defence of the Realm, for which purpose only the Law gave to the King this Prerogative: And it is not like to the Mynes of Gold and Silver, for there the King hath interest in the Mettal, and for this, there he may dig for it, Quia quando lex aliquid alicui Concedit Concedere videtur id sine qua res ipsa esse non Potest: Vide Plow. Com. in le Case de Mynes. So the King may dig in the Land of the Subject for Treasure trove, for he hath property: And if the Powder which is so made by the Ministers of the King, begin to decay (as it will in two years) then it ought to be changed for other, or the money coming of it ought to be imployed for Powder for the defence of the Realm, or the Ministers of the King ought to make provision of Saltpeter which will endure a long time, and when need is, to make it into Gun-powder, which may be made before the Navy can be put in readinesse. 3. Point.

The Ministers of the King cannot undermine, weaken, or impair any of the Walls or foundation of any Houses, be they Mansion houses, or Out-houses, or Barns, Stables, Dove-houses, Mills, or any other Buildings: And they cannot dig in the Floor of my Mansion house which serves for the habitation of man, for this, that my house is the safest place for my refuge, safety, and comfort, and of all my Family, as well in sicknesse as in health, and it is my defence in the night and in the day, against Felons, Wilfoers, and harmfull Animates; And it is very necessary for the weal publick, that the habitation of Subjects be preserved and maintained. 4. Point.

And there are two notable Presidents, by which it appears, that the King by his Prerogative had power to prohibite Depopulation, and provide for habitation.

The one in the 43 Ed. 3. Rot. claus. in turri, numero 23, pro villa de Southampton.

The other, An. 21. R. 2. in dorso Claus. par. 1. N 15, by which the King prohibites that, Incolæ villarum predictarum non prosternant domus suas in villis predictis in alias migratur regiones, &c.

Also the Ministers of the King cannot dig the floor of any Barn imployed for the safe custody of any Corn, Hay, &c. of the Owner, for that the floor of a Barn cannot be made dry and serviceable again of a long time. But they may dig in the floors of Stables and Dove-houses, so that there

be sufficient room left for the Horses and other Cattell of the Owner: And so that they repair it in convenient time, in so good plight as it was before; Also they may dig in the floors of Cellars and Vaults, so that there be sufficient room for the necessaries of the Owner; and so that the Wine, Beer, and other necessary provision of the Owner be not removed, or in any sort impaired. And they may dig any mud-walls which are not the Walls of any Mansion house, so that order be taken that the Mansion house be well defended, as it was before, so they may dig in the ruines and decaies of any House or Buildings, which are not preserved for the necessary habitation of men.

5. Point. They ought to make the places in which they dig so well and commodious to the Owner as they were before.

6. Point. They ought to work in the possession of the Subject, but betwixt Sun rising and setting, so that the Owner may make fast the Doors of his House, and put it in defence against Pilfoers.

7. Point. They ought not to place or fix any Furnaces, Vessels, or other necessaries in any house or building of the Subject without his consent, or so neer any Mansion house, as by it, it may receive prejudice or disquiet.

8. Point. They ought not to continue in one place over a convenient time, nor to return again into the same place before convenient time (which is long time) be passed.

9. Point. It was resolved that the Owner of the Land cannot be restrained from digging and making Saltpeter, for the King hath not interest in it as he hath in Gold and Silver in the Land of the Subject, for the King in the case of Saltpeter hath put pur veyance, so that the property of it is in the Owner, and for that he cannot be excluded of the Commodity in his own Land.

And it is to be observed, that before 31 Eliz. which was the next year after the Spanish Invasion, there was not any license or commission of any King or Queen of this Realm, for the taking of Saltpeter: But in the said 31. year there were two Licenses granted.

The one particular to George Constable Esquire, and the other generall to George Evelin, Richard Hills, and John Evelin. The first gives Constable power and authority for eleven years to dig open and work for Saltpeter within the County of York, Nottingham, Lancaster, Northumberland, Cumberland, and the Bishoprick of Durisme. as well within our Lands, Grounds, and Possessions, as also within the Lands, Grounds, and Possessions of any of our loving Subjects within the Counties aforesaid: And the consideration of the Patent was for a great quantity of Saltpeter yearly by the said George Constable, to be made and provided for the Store of the Queen, at a lower rate then before was paid.

And further our will and pleasure is, that the said George Constable, &c. shall at his own proper costs and charges, erect, make up, and lay all mud-Walls, Stables, and Grounds whatsoever so digged up, &c. in which license it was observed, that no power is given to dig in any Mansion house, Barns, Dove-houses, &c. but as appears in the last Clause in mud-Walls, Stables, and grounds, for the Clause of reparation ought without question to extend to all the places to which the power to dig extends, &c.

The other Commission to Evelin, &c. extends to all the Realm of England

land and Ireland, and all other Dominions of the King, as well within our own Lands, Grounds, and Poſſeſſions, as alſo within the Lands, Grounds, and Poſſeſſions of any of our Subjects.

Note the License begins with Lands, &c. ſo that Houſes nor Buildings are not named in it, for the Learned Counſell of the Queen, as it ſhould ſeem, who drew the License, thought not that the License ought not to extend to the Manſion houſe, or other neceſſary houſes, for otherwiſe it would have been expreſſed in the License. And after Scilicet 18. October 2 Jac. Commiſſion was granted to Evelin, and others, to take Saltpeter in the Lands, Poſſeſſions and other convenient places, and in convenient times, ſo that there were but three Licenſes or Commiſſions ever made. And in none of them any power by expreſſe words is given to dig in any Manſion houſe, &c. And in none of them is any Prohibition to the Subject to dig in his own Land: And it is obſerved that in the ſaid laſt Commiſſion is a clauſe that for carriage none ought to go above nine miles from his own houſe, and that he ſhall have 4 d. for every mile laden and empty, Viz. Eundo & redeundo. And the reaſon was, the Owner may return again to his own houſe in the ſame day: And note Reader, here is a good Reſolution of the Juſtices for the true Prerogative of the King in taking purveyance of Saltpeter.

Treaſon.

IN this very Term, one George Leak a Clerk in Chancery, had upon an ordinary peece of Parchment, by great deceit, fixed with a kind of Glew, another Parchment ſo thin, as art could make it, ſo that it did appear but one peece of Parchment; And upon the thin peece which was as it were the ſuperficies of the other, he writ by good warrant a License, which was brought to the Lord Chancellor, and ſealed with the great Seal: And after the ſaid George took the thin peece upon which the Writing was, from the other Parchment to which the great Seal was affixed, and then all was a blanck with the great Seal annexed: And after the ſaid George writ upon the blanck a grant of the King of certain Lands: And what offence this was, was the ſame Term debated amongſt the Juſtices; And it was a great queſtion amongſt them, whether this was high Treaſon or no: And it ſeemed to me that this cannot be adjudged high Treaſon, untill it was ſo declared by Parliament: For true it is, that the Statute of 25 Ed. 3. declare that if a man do counterfeit the great Seal or privy Seal, that this is high Treaſon: And true it is, that the Judges in times paſt, Viz. 2 H. 4. 25. have adjudged that the taking was printed with the great Seal, from one Patent and fixing of it to another Writing made in the name of the King is a counterfeiting of the great Seal, for this that he abuſeth the ancient Seal, in removing of it from the Patent, and fixing of it on another without warrant: And ſo Stamford lib. 1. fol. 3. provided that it was adjudged in his time, and yet 40. Aſſ. pla. 33. that it was petite Treaſon after the Statute: And 37 H. 8. Title Treaſon; Brook by the Juſtices that this was not Treaſon: And I have ſeen a Record of 2 H. 4. where the party was indicted generally for counterfeiting of the Great Seal; And the Jury found him not guilty of counterfeiting of the Great Seal, as it was ſuppoſed by the Indictment: And found over the eſpeciall matter, that he took the Great Seal from one Patent and fixed it to another, and put this in execution: And judgment is entered againſt the party. But without queſtion againſt the Law, for as much as they found him firſt not guilty of counterfeiting, for this is a full Verdict, and all the reſt is Surpluſage; but this caſe in queſtion much differs from it, for in this caſe George Leak hath not any medling with the Great Seal

Seal, but this remains now annexed as it did before: And for this reason it seems to me, if the Seal be fixed to a blanck Patent, and one writes a Grant in it, contrary to his direction and trust; or if one hath Letters Patents with good warrant made, and them raise in a place materiall, and put in other words, to the great prejudice of the King: In none of these cases can it be adjudged a Counterfeit of the great Seal, for the Statute of 25 Ed 3. doth not speak of counterfeiting of writing, but only of the great Seal, And the Delinquent in this case doth not meddle with the Seal, but only with the Writing. And I shewed a notable president in Claus. 42. Ed. 3. memb. 8 in dorso, where the Case was, that King R. 1. by his Charter granted divers Lands and Liberties, Abbati de Bruera, in which the Abbot raised out this word Fittetrids, and in stead of it writ Est leigh. And upon shewing of it obtained a Confirmation of it from King Ed. 3. And an allowance of it in Banco R. And for this offence the said Abbot was called before the King and his Council, Viz. In the Star Chamber, where the Abbot charged one Robert Rugg his Com-monk, with the rasure: And the Abbot was convict (which could not be but in Court) And it was part of the Sentence, that the said Charter-confirmation and allowance of it, should be brought in by the Abbot to be cancelled. Out of which Record I do observe five things.

1. The antiquity of the Star Chamber, and this then was a Court, in which the Abbot was convict, and sentence given.

2. That the said Rasure was not any Counterfeit of the Great Seal, for if the offence had been high Treason, it should not have been determined before the Councell of the King in the Star Chamber.

3. That Spirituall persons were then punishable for offences before temporall Judges.

4. That if there be rasure of a Deed between Subject and Subject, in a place materiall, all the Deed becoms naught: And the party to plead to it Non est factum. So, if the Patentee rase his Letters Patents in any place materiall, all the Patent becoms of no force by the Law, as appears by the said Sentence, all the Patent and all the dependance upon it, Viz. The confirmation and allowance of it should be all cancelled and defaced.

5. That although that it is commonly said, that an Abbot can do nothing in prejudice of his house, yet in this case he may do it, for the King ought not to be in worse case then a Subject: And if the Abbot had raised a Charter made to him by a Subject, in such manner as he had raised the Charter of the King, the Deed of the Subject had become of no force: And so in case of the King; And then I conclude that if the rasing of a Word in the Patent of the King, be not Treason, the rasing of two or three, or all the words of the Patent, and Writing a new Grant is not treason: And I recited another President in An. R. 2. in Parliament, where the case was, that the Amballador of the Duke and State of Genoa being here under the safe conduct of the King, for the businesse of the King and the Realm, was murthered by certain Subjects of the King: And this matter was debated in Parliament, and there resolved, declared, and decreed, that this was treason: Note it well, this case was not referred to the Judges, but was declared in and by Parliament: For it is provided by the said act of 25 E. 3. that for this that many other cases of like Treason, might happen in time to come, which men cannot think nor declare at present, that if another case supposed Treason, and which is not specified in the act, shall come before any of the Justices, the said Justices shall stay without going to Judgment of Treason, untill the case be shewen

John—— Imperiall.

ſhewen before the King in Parliament, who ought to adjudge it Treaſon or other Felony; In which branch two things are to be obſerved.

1. That although a caſe happen like to the caſes of Treaſons mentioned in the ſaid act, that the Judges ought not (as they do in other caſes by equall and like reaſon) adjudge it to be Treaſon, for that branch reſtrains them; But this ought to be declared in Parliament: for the words of the act are, Foraſmuch as many other caſes of Treaſon, like, &c. The ſecond thing is, that when a particular caſe (as the ſaid caſe of an Ambaſſador of a King) was adjudged high Treaſon, Et legatos violare contra jus gentium eſt: And it appears 2 Reg. cap. 10. Hamon Rex amonitarum Legatos Davidis contumeliis, &c. ſuper quo acerimum bellum movetur, &c. by which it appears the conſequence of an abuſe of an Ambaſſador, &c. Quod talis injuria eſt juſti belli cauſa. Note that Legatus ejus vice fungit, a quo deſtinatur & honorandus eſt, ſicut ille Cujus vicem gerit. And afterwards George Leak, upon Examination before the chief Juſtice of England, made a clear confeſſion of all the manner and circumſtances of the fact: And upon examination the caſe (as it was delivered to the Juſtices to conſider of it, and to give their opinions) was ſuch, George Leak joyned two blanck Parchments fit for Patents, ſo cloſe together with mouth Glew as they were taken for one, & did put one Label through them both; Then upon the uppermoſt he writ a true Patent, and got the Great Seal put to the Label, ſo the Label and the Seal were annexed to both the Patents, the one written and the other blanck, then he cut off the glewed skirts round about, and took off the other Parchment which was written, and was a perfect Patent, from the Label with which the great Seal did ſtil hang to the blank Patent, then he writ another Patent within the blanck Patent, and did publiſh it as a good Patent: Herepon two queſtions were moved.

1. Whether this offence be high Treaſon or no?

2. If it be high Treaſon, then whether he may be indicted generall for the counterfeiting of the great Seal, or elſe the ſpeciall fact muſt be expreſſed: And the Juſtices were divided in opinion in the firſt point of the caſe: And my ſelf and divers others held that this act was not Treaſon, for the cauſes and reaſons alledged before. But the chief Juſtice and divers others were againſt us; And by reaſon of the diverſity of opinions, Reſpectuatur, vide Fleata lib. 1. cap. 22. Item crimen falſi dicitur, cum quis illicitus cui non fuerit ad hæc data authoritas de ſigillo Regis rapto vel invento & brevia Carteſiæ: vide le Attainder de Eliz. Barton Edward Boking, &c. by Parliament for divers Conſpiracies, Practiſes, and words which were not declared by Parliament to be Treaſon: And for this they were attainted, Per Parliament. 25 H. 8. 25 H. 8. cap. 12.

Hill. 24. Eliz.

IN the Exchequer, a Merchant brought eighty weigh of Bay-ſalt, by Sea to a Haven in England, and out of the Ship ſold twenty weighs, and diſcharged them to another Ship in which they were tranſported: But the ſaid twenty weighs were never actually put on the ſhore: And for the reſidue, Viz. 60. he agreed for the Cuſtom, and put them upon land: And now the doubt was 1 Eliz. cap. 12. For the words of the Statute concerning Exportation, ſent from the Wharf, key, or other place on the land, Cuſtome. 20 R. 2. cap. 4.

and concerning Impoztation take up, discharge, and lay on land: If in this case the said twenty weights which alwaies were water-born, and never touched the land, ought to pay Custom as well inwards as outwards.

And it was resolved, that in both the Cases Custom ought to be paid, for the discharging out of the Ship upon the Sale aforesaid, amounts in Law to a putting them upon the land, for in the Law this is Infra Corpus comitatus: And if the Law shall not be so taken, the King may be defrauded of all his Custom, and in the case forasmuch as no Custom was paid, it was resolved that the Goods were forfeited, &c.

Note, a good diversity when the King shall be bound by act of Parliament, so that he cannot dispence with it by any clause of Non obstante. No act can bind the King from any Prerogative which is sole and inseparable to his person, but that he may dispence with it by a Non obstante: As a Soveraign power to command any of his Subjects to serve him for the publike Weal: And this solely and inseparably is annexed to his person: And this Royall power cannot be restrained by any act of Parliament, neither in Thesi, nor in Hypothesi, But that the King by his Royall Prerogative may dispence with it, for upon commandment of the King, and obedience of the Subject, doth his Government consist: As it is provided by the Statute of 23 H.6.cap.8. that all Patents made or to be made of any Office of a Sheriff, &c. for tearm of years, for life, in Fee simple, or in tail, are void and of no effect, any Clause or Parol de non obstante, put, or to be put into such Patents, to be made notwithstanding. And further, whosoever shall take upon him or them to accept or occupy such Office of Sheriff by virtue of such Grants or Patents, shall stand perpetually disabled to be or bear the Office of Sheriff within any County of England by the same authority; and notwithstanding that by this act, 1. The Patent is made void. 2. The King is restrained to grant Non obstante. 3. The Grantee disabled to take the Office, yet the King may by his Royall Soveraign power of commanding, may command by his Patent, (for such causes as he in his wisdom doth think meet and profitable for himself and the Common-wealth, of which he himself is solely Judge) to serve him and the Weal-publike, as Sheriff of such a County for years, or for life, &c. And so was it resolved by all the Justices of England, in the Exchequer Chamber, 2 H.7.66. If so Royall power to pardon Treasons, Murthers, Rapes, &c. is Prerogative incident solely and inseparably to the person of the King: And for this Non obstante an act of Parliament, to make the pardon of the King void and restrain the King to dispence with this by Non obstante, and to disable him to whom the pardon is made, to take or plead, it shall not bind the King but that he may dispense with it: And this is well proved by the act of 13 R. 2. Parliament 2. cap. 1. for by this it was enacted, that no Charter of Pardon, from henceforth be allowed by whatsoever Justices, for Murther, Treason, Rape of a Woman, nor be specified in the said Charter, and if it be otherwise, be the Charter disallowed.

Note, this was the surest way that the Parliament could take to restrain the King to pardon Murther, unlesse that he pardon it by expresse tearms, which they thought the King would not, for they knew that the King could not be restrained by any act to make a Pardon; for mercy and power to pardon is Prerogative incident solely and inseparably to the person of the King: And it hath oft-times been adjudged that the King can pardon Murther by generall words without any expresse mention, with Non obstante, the said Statute, see 4 H.4.cap.31. In which it is ordained

that

that no Welshman, be Justice, Chamberlain, Treasurer, Sheriff, Steward, Constable of a Castle, Escheator, Coroner, or chief Forester, nor other Officer whatsoever, nor Keeper of Records, &c. in any part of Wales, notwithstanding any Patent made to the contrary, with clause of Non obstante licet sit Wellicus natus: And yet without question, the King may grant with a Non obstante; So Purveyance for the King and his Houshould, is incident solely and inseparably to the person of the King: And for this cause, the act of Parliament held in the time of H. 3. De tallagio non concedendo, Title purveyance, Rastall, which bars the King wholly of Purveyance, is void, as it appears in Co. lib. fol. 69. But in all such cases, although that the King may dispence with Statutes, yet a generall dispensation or grant without Non obstante is void: But in things which are not incident solely and inseparably to the person of the King, but belongs to every Subject and may be severed, there an act of Parliament may absolutely bind the King: As if an act of Parliament do disable any Subjects of the King, to take any land of his Grant, or any of his Subjects, (as Bishops) as it is done by the Statute 1 Jac. cap. 3.) to grant to the King, this is good, for to grant or take Lands or Tenements, is common to every Subject: And for this it is not Proprium quarto modo, to Kings, Scilicet omni soli & semper, vide the case of Deans and Chapters upon the Statute of 13 Eliz. vide 8. R. 2. cap. 2. & 33. H. 6. That none shall be Justice of Assise, &c. in the County where he was born, or did inhabite, and yet the King with speciall Non obstante may dispense with this, for this belongs to the inseparable Prerogatives of the King, Viz. his power of commandment to serve, &c.

Hill. 4. Jac. Regis.

NOte, Mich. 4. Jac. Post prandium, There was moved a question amongst the Judges and Serjeants at Serjeants Inne, If the high Commissioners in Ecclesiasticall causes, may by force of their Commission imprison any man or no?

High Commissioners, if they have power to Imprison.

First of all it was resolved, by all, that before the Statute of 1 Eliz. the King might have granted a Commission to hear and determine Ecclesiasticall Causes: But then notwithstanding any clause in their Commission, the Commissioners ought to proceed according to the Ecclesiasticall Law allowed within this Realm, for he cannot alter neither his temporal nor his Ecclesiasticall Laws within this Realm by his Grant or Commission: Vide Caudries Case, 5. Report. Then all the question rests upon the act of 1 Eliz. which as to this purpose rests upon three branches.

1. Such Commissioners have power to exercise, use, occupy, execute all Jurisdiction Spirituall and Ecclesiasticall.

2. Such Commissioners by force of Letters Patents have power, to visite, reform, &c. all Heresies, &c. which by any manner of Spirituall or Ecclesiasticall power, &c. can, or lawfully may be reformed, &c. so that these branches limit the Jurisdiction, and what offences shall be within the Jurisdiction, of such Commissioners, by force of Letters Patents of the King: And this is all, only such Offences may lawfully be reformed by the Ecclesiasticall Law.

3. The third branch is, that such Commissioners after such Commission delivered to them so authorised, shall have power and lawfull authority by vertue of this act, and the said Letters Patents, to exercise, use, and execute

cute all the Premisses according to the tenor and effect of the said Letters Patents. This branch gives them power to execute their Commission. But it was objected that this branch doth not give to the Queen power by her Letters Patents, to alter the proceedings of the Ecclesiasticall Law, or gave to the Queen absolute power by her Letters, Patents, to prescribe what manner of proceedings, or punishment concerning the Lands, Goods, or bodies of the Subject: And this appears by the Title of the act restoring to the Crown the ancient Jurisdiction, so that the intent was to make restitution, and not any innovation in proceeding or punishment: And it was observed that this last branch gave to them power to execute all the Premisses, according to the tenor and effect of the said Letters, Patents, so that these words So authorized.

And the said Letters Patents, hath relation only to the authority of the Letters Patents, before specified, Viz. such as gave to them power to visite, reform, redresse, order, correct and amend, all Errors, Heresie, Scismes, Abuses, Contempts, and Enormities whatsoever; which by any manner of Spiritual or Ecclesiasticall power, and can or may lawfully be reformed, &c. These are the tenor and effect of the Letters, Patents before remembred: And if any other construction shall be made.

1. It shall be against the expresse letter, Scilicet, said Letters Patents.

2. It shall be full of great perill and inconvenience, for then not only imprisonment of body, but confiscation of Lands, Goods, &c. And some corporall punishment may be imposed, for Heresie, Scisme, Incontinence, &c. Also power may be given to them to burn any man for Heresie, which shall be against the Common Law of the Land.

Vide a notable Case adjudged in this point, *Hill.* 42. *El. fol.* 389. as to imprisonment, *Smiths* Case, for at the last Consultation was granted: And at last by the better opinion, as to things committed to them by Commission, they may put fine and imprisonment.

Women. Felony.

Note the Statute of 3 H. 7. cap. 14. stands upon a preamble and a purview; the preamble is, Where Women, as well Maids as Widows and Wives having substance, &c. and so being Heirs apparent, &c. for the lucre of such substance be taken by Misdoers, contrary to their wills, and after married, &c. or defiled: So note these three words in the Preamble, Viz.

1. Be taken.
2. Be married.
3. Be defiled.

The Purview is, that what person or persons from henceforth that taketh a woman so against her will unlawfully, Viz. Maid, Wife, or Widow, that such taking, procuring, and abetting to the same be fellony; And that such Misdoers, Takers, and Procurers to the same, and Receivers, knowing of the said offence in form aforesaid, be henceforth reputed and judged as principall Felons, so that it is not said in the Purview so taken, married, or defiled, but only so taken against their will: And upon this great question was moved, 4, & 5. Phil. & Mar. in the Star Chamber, if the Eloynment against her will, without marriage, or carnall copulation (which is intended by this word Defiled) be Fellony or no: And the opinion of Brook and some other of the Justices was, that it was

Fellony

Felony; But Sanders chief Juſtice was againſt it, and afterwards, as Periam chief Baron did report. It was reſolved by all the Juſtices in the 26 Eliz. that ſuch Eloynment only is not Felony by the intent of the Statute, without marriage or carnall copulation, for the miſchief was not only the taking, but the marriage or the defiling, which was (as it was ſaid in the Preamble) to the diſparagement of the ſaid woman, and utter heavineſſe and diſcomfort of her friends: And the Purview ought to purſue the miſchief.

Secondly, this word So, hath reference to the Preamble, and all the miſchief contained in it.

Note by the expreſſe Purview of the Act, the acceſſary both before and after is made principall, &c.

Paſch. 4. Jac. Regis.

NOte by the commandment of the King, it was referred to Popham chief Baron, and my ſelf, what right the Queen which now is, hath, and in what caſes to a Right claimed by her, called Aurum Reginæ, that is to ſay, Pro centum marcis argenti una marca auri ſolvend. per illum qui ſponte ſe obligat: And upon conſideration had of it by a long time and view of all the Records and Preſidents, Viz. Librum Rubrum in ſcaccario, fol. 56. de Auro Reginæ, where it is ſaid, that this is to be taken De iis qui ſponte ſe obligant Regi, &c. which is the foundation of this Claim; And of a Record in the Tower, 52 H. 3. And of a Record in the Exchequer, 4. E. 1. and of a Record in the Exchequer, Hill. 12. Ed. 3. And in the Tower in the ſame year, in Rot. clauſ. And of Acts of Parliament, 15 Ed. 3. cap. 6. & 31 Ed. 3. cap. 13. and the 13 R. 2. in Turri, and divers other Preſidents and Proceſſe out of the Exchequer in the time of R. 2. H. 4. and other Kings, untill the time of H. 7. Aurum Reginæ.

It was reſolved that the Queen hath right to it, but with theſe limitations. Reſolution.

1. That it ought to be Sponte by the Subject Sine coactione, ſo that this ought to be at the pleaſure of the Subject, whether he will offer, or give, or no: And for this all Fines upon Judgment, or by offer or fine for alienation, or in any other caſe where the Subject doth not do it Sponte ſine aliqua coactione, Viz. That the King of right ought to have it, there the Queen ſhall have nothing.

2. It ought to be Sponte ſine conſideratione alicujus reventionis ſeu intereſſe, That the King hath in Eſſe, in Jure Coronæ: And for this upon ſale or demiſe of his Lands, or Wards, or Goods of Fellons, Out-lawes Et ſimili caſu, for theſe are Contracts and Bargains concerning the Revenews and Intereſts of the King: And it cannot be ſaid in ſuch caſe that the Subjects Sponte ſe obligant, as to purchaſe or buying any the Revenews or Intereſts which the King hath.

3. It ought to be Sponte ſuper conſiderationem, & non ex mera gratia & benevolentia ſubditi, For that which is of meer Grace is not properly ſaid of Obligation or Duty, and the words of the Records are to have De iis qui ſponte ſe obligant, And ſo was it ordained by the King and his Councell, as appears by the Record of Hill. 4. E. 1. in Scaccario, &c.

4. It ought to be Sponte ſuper conſiderationem que non longe reventionem ſeu intereſſe Coronæ, in any thing which the King hath: As if the

Subject give to the King Sponte a ſumm of mony for license in Mortmain, or for to create a Tenure of himſelf, to have a Fair, Market, Park, Chaſe, or Warren, within his Manor, there the Queen ſhall have it: For the Subject did this Sponte, and was not conſtrained to it: And this doth not concern any Revenue or Intereſt of the King; But if the King hath a Fair, or Market, or Park, or Warren, and grant it for a ſumm of mony, there the Queen ſhall have nothing, for this was a thing in Eſſe, and parcell of the Revenue of the Crown: And by that it appears, that forasmuch as little or nothing is given in ſuch caſe where this of right is due, this is not now of any ſuch valne as was pretended: And this reſolution was reported to our Soveraign Lord the King by Popham in the Gallery at Whitehall.

Paſch. 5. Jac. R.

Foreſts, Chaſes.

IN this ſame Term it was informed to the King that great wrongs were done in his Foreſt of Leiceſter in the County of Leiceſter: And in his Foreſt of Bowland in the County of Warwick, &c. parcell of his Dutchy of Lancaſter; And upon this by warrant of the King under his Signet, all the Juſtices were aſſembled to reſolve certain queſtions, to be moved concerning the Foreſts by the Attorney of the Dutchy and the Counſell of the other part, which were Foreſts and Chaſes, the which being matter in fact, the Judges could not give their reſolutions but by way of direction: And it was reſolved by them, that if theſe are Foreſts, it will appear by matter of Record, as by Eyres of Juſtices of Foreſts; Swanny-motes Officers of Foreſts, as Regardors, Agiſters, Verderors, &c. But the appellation of it by the name of a Foreſt in Grants, Offices, and Conveyances, is not any proof that this is a Foreſt in Law.

2. It was reſolved by all the Juſtices, that if theſe are not other then free Chaſes, and no Foreſts in Law, then he who hath any Free-hold within them, may cut his Timber and Wood growing upon it, without any view or license of any: But if he cut ſo much, that there is not ſufficient for Covert, and to maintain the Game of the King, he ſhall be puniſhed at the ſuit of the King. And ſo if a common perſon hath Chaſe in another Soil, the Owner of the Soil cannot diſtroy all the Covert, but ought to leave ſufficient Covert, and ſufficient Bruſe-wood, as hath been accuſtomed.

3. It was reſolved, that within ſuch a Chaſe the Owner of the Soil by preſcription may have Common for his Sheep, and Warren for Conies by grant or preſcription: But he cannot ſur-charge with more then hath been uſed, then from which, &c. nor make Burrowes in other places then hath been uſed from the time of which, &c. unleſſe he hath Warren by Grant, and then he may uſe it according to his Grant; but he cannot erect a new Warren without Charter.

4. It was reſolved, that he who hath ſuch a Warren may lawfully build upon his Inheritance, within his Warren a convenient Lodge for preſervation of his Game.

5. It was ſaid by Popham chief Juſtice, that it was adjudged in the time of the chief Baron Bere, in the Exchequer, that a man may preſcribe to cut his Wood upon his own Inheritance within a Foreſt, although it was againſt the Act in the 43 Ed. 1. which is in the Abridgment Title Foreſt

zeſt 21. And this was the caſe of Sellenger, for the Wood in the Foreſt of Hay in the County of Hereford: And their reaſon was for this, that this was but a Declaration of the Common Law, and it may be tolled by Cuſtom, as Littleton ſaid, vide 2. Ed. 2. Title Treſpaſſe, fol 9. in the time of Ed. 1. Treſpaſſe 239. Plowd. Com. Dyer 72. 322 Ed. 4. cap. 7. that the Subject may have a Foreſt: But this is intended if he hath power to have Swanymotts and Juſtices in Eyre and Foreſters appendant to his Foreſts.

Conſuetudo ex rationabili cauſa uſitata privat communem legem: And it was held by ſome that this was but an Ordinance, and not an Act of Parliament.

Paſch. 5. Jac. Regis.

In this very Term between Rice ap Evan ap Floyd, and Richard Barker, one of the Juſtices of the Grand Sellions in the County of Angleſey, and others defendants: It was reſolved by Popham and Cook chief Juſtices, the chief Baron, and Egerton Lord Chancellor, and all the Court of Star Chamber, that when a grand Inqueſt indicts one of Murther or Felony, and after the party is acquitted, yet no conſpiracy lies for him who is acquitted, againſt the Indictors, for this that they are returned by the Sheriff by proceſſe of Law to make enquiry of Offences upon their Oath, and it is for the ſervice of the King and the Common-wealth. And as it is ſaid in the 10 Eliz. 265. they are compellable to ſerve the Law, and the Court; And their Indictment or Verdict is matter of Record, and called Veredictum, and ſhall not be avoided by ſurmiſe or ſuppoſall, and no attaint lies, And for this reaſon they ſhall not be impeached, for any conſpiracy or practice, before the Indictment: For the Law will not ſuppoſe any mindifferent, when he is ſworn to ſerve the King: And with this agrees the Books in 22 Aſſ. 77. 27. Aſſiſe p. 12. 21 Ed. 3. 17. 16 H. 6. 19. 47 Ed. 3. 17. 27 H. 8. 2. F. N. B. 115. 2. But is otherwiſe of a Witneſſe, for if he conſpire out of the Court, and after ſwear in Court, his Oath ſhall not excuſe his conſpiracy before, for he is a private perſon, produced by the party and not returned by the Sheriff, who is an Officer ſworn, and the Jurors are ſworn in Court as indifferent perſons; And the Law preſumes, that every Juror will be different when he is ſworn; Nor will the law admit proof againſt this preſumption.

Conſpiracy doth not lye againſt a Juror or Indictor, but againſt a Witneſſe.

2. It was reſolved, that when the party indicted is convict of Felony by another Jury upon Not guilty pleaded, there he never ſhall have a Writ of Conſpiracy, but when the party upon his arraignment is Legitimo modo acquietatus: But in the caſe at the Bar, the Grand Jury who indicted one William Price for the murther of Hugh ap William, the Jury, who upon not guilty pleaded convicted him, were charged in the Star Chamber for Conſpiracy againſt him, and indicted & convicted, which manner of Complaint was never ſeen before, for if the party ſhall not have a Conſpiracy againſt the Indictors, when the Priſoner is acquitted upon his Indictment, a Multo fortiori when he is lawfully convict, he ſhall not charge neither the Grand Inqueſt by whom he was indicted, nor the Jury who found him guilty: For the Law in ſuch caſe doth not give any attaint, for this that he was indicted by the Oath of twelve men at the leaſt, and found guilty by twelve. And in theſe Caſes the King is the ſole party to the proceedings againſt the Priſoner: But on the other ſide, when a Jury hath acquitted a Felon or Traitor againſt manifeſt proof, there they may

may be charged in the Star Chamber, for their partiality in finding a manifest Offender not guilty, Ne maleficia remanerent impunita. And it will be a cause of infinite vexation and occasion of perjury and smothering of great Offences, if such averments and supposals shall be admitted after ordinary and judiciall proceeding: And it will be a means Ad deterrendos & detrahendos juratores a servitio Regis.

3. It was resolved that the said Barker who was Judge of Assise, and gave judgment upon the verdict of death, against the said W. P. and the Sheriff who did execute him according to the said Judgment, nor the Justices of Peace who did examine the Offender, and the Witnesses for proof of the murther before the Indictment, were not to be drawn in question, in the Star Chamber for any Conspiracy, nor any witnesse, nor any other person, ought to be charged with any Conspiracy in the Star Chamber, or elsewhere when the party indicted is convicted or attaint of Murther or Felony: And although the Offender upon the indictment was acquitted, yet the Judge be, Judge of Assise, or a Justice of Peace, or any other Judge, being Judge by Commission and of Record, and sworn to do Justice, cannot be charged for Conspiracy, for that which he did openly in Court as Judge or Justice of Peace: And the Law will not admit any proof against this vehement and violent presumption of Law, that a Justice sworn to do Justice will do injustice, but if he hath conspired before out of Court this is extrajudicial, but due examination of Causes out of Court, and enquiring by testimonies Et similia, is not any Conspiracy, for this he ought to do; but subornation of Witnesses, and false and malicious Persecutions, out of Court, to such whom he knowes will be Indictors, to find any guilty, &c. amounts to an unlawfull Conspiracy.

And if Records are of so high a nature, that for their sublimity they import verity in themselves; And none shall be received to aver any thing against the Record it self, And in this point the Law is founded upon great reason, for if the Judiciall matters of Record should be drawn in question, by partiall and sinister supposals and averments of Offenders, or any on their behalf, there will never be an end of Causes: But Controversies will be infinite, Et infinitum in jure reprobatur: And for this it is adjudged in the 47 Ed. 3. 15. That a Judge who hath a Commission, Viz. That is of Record, shall not be charged in Conspiracy, which is to be understood of what he did in Court, for the reasons and causes aforesaid: And with this agrees the Book, 21 Ed. 4. 67. & 27 Ass. pl. 12. And the reason is for this that the party is acquitted; and the accusing stands with the Record: And accordingly was the Law taken in this case: But in a Hundred Court, or other Court which is not of Record, there averment may be taken against their proceedings, for that it is no other then matter in Pais and not of Record: As it appears in the 47 Ed. 3. 15. Also one shall never assign for Error, against that which the Court doth as Judges, as to say that the Jury gave Verdict for the Defendant, and the Court did enter it for the Plaintiff, or to say that the party who levied the Fine was dead before the Fine was levied, or such like, Vide 1 H. 6. 4. 39 H. 6. 52. 7 H. 7. 4. 11 H. 7. 28. 1 Mar. Dyer 89. But in a Writ of false Judgment, the Plaintiff shall have direct averment against that which the Judges in the inferior Court, have done as Judges, Quia Recordum non habent, and with this accords 21 H. 6. 34. And as a Judge shall not be drawn in question in the Cases aforesaid, at the suit of the parties, no more shall he be charged in the said Cases before any other Judge at the suit of the King: And for this in the 27 Ass. pl. 18. One was indicted and arraigned at the suit of the King, as he was a Justice of Oyer and Terminer, where certain persons were indicted

Averment.

of

of Treſpaſſe before him, he made an entry of Record, that they were indicted of Felony: And it was adjudged that this Indictment was againſt the Law for this, that he was a Juſtice by Commiſſion: and that is of Record: And this preſent act ſhall be to defeat the Record. Hoc eſt, to aver againſt that which he did as Judge of Record, which cannot be by the Law, Vide 27 Aſſ. pl. 23. 2 R. 3. 9. 28 Aſſ. pl. 21. 9 H. 6. 60. And it was ſaid, that it was the caſe of one Nudigate, who as a Juſtice of Peace had recorded a Force upon a View, which he did as Judge upon Record; And a Will was exhibited againſt him in this Court, for this, that he had falſely made a Record, where indeed there was not any Force: And by the opinion of Catlyn and Dyer, chief Juſtices, it was reſolved, that, that thing that a Judge doth as Judge of Record, ought not to be drawn in queſtion in this Court.

Note well, that the ſaid matters at the Bar were not examinable in the Star Chamber: And for this it was ordered and decreed by all the Court, that the ſaid Bill without any anſwer to it, by the ſaid Richard Barker ſhal be taken off the File and cancelled, and utterly defaced: And it was agreed, that inſomuch as the Judges of the Realm have the adminiſtration of Juſtice under the King, to all his Subjects, they ought not to be drawn into queſtion for any ſuppoſed corruption, which extends to the annihilating of a Record, or of any judiciall proceedings before them, or tending to the ſlander of the Juſtice of the King, which will trench to the ſcandal of the King himſelf, except it be before the King himſelf; For they are only to make an account to God and the King, and not to anſwer to any Suggeſtion in the Star Chamber, for this would tend to the ſcandall and ſubverſion of all Juſtice. And thoſe who are the moſt ſincere, would not be free from continuall Calumniations, for which reaſon the Orator ſaid well, Invigilandum eſt ſemper; multæ inſidiæ ſunt bonis.

And the reaſon and cauſe why a Judge, for any thing done by him as Judge, by the authority which the King hath committed to him, and as ſitting in the ſeat of the King (concerning his Juſtice) ſhall not be drawn in queſtion before any other Judge, for any ſurmiſe of corruption, except before the King himſelf is; for this the King himſelf is De jure, to deliver Juſtice to all his Subjects: And for this, that he himſelf cannot do it to all perſons, he delegates his power to his Judges, who have the Cuſtody and Guard of the Kings Oath.

And forasmuch as this concerns the honour and conſcience of the King, there is great reaſon that the King himſelf ſhall take account of it, and no other.

And Thorp who was drawn in queſtion for corruption, before Commiſſioners, was held againſt the Law, and upon that he was pardoned; and it is contained in the ſame Record, Quod non trahitur in exemplum, vide the concluſion of the Oath of a Judge, Vide the Chronicle of Stow. 18 Ed. 3. 312.

Note, Thomas Weyland chief Juſtice of the Common-bench, Sir Ralph Hengham Juſtice of the Kings Bench: And the other Juſtices were accuſed of Bribery and Corruption, and their cauſes were determined in Parliament, where ſome were baniſhed, and ſome were fined and impriſoned.

Vide 2 Ed. 3. fol. 27. That the Juſtices of Trayl-baſton (ſo called for their ſummary proceeding) were in a manner Juſtices in Eyre: And their authority was founded upon the Statute of Ragman, which you may ſee in the old Magna Charta, Vide the form of the Commiſſion of the Trayl-

baſton, Hollingſhead, Chron. fol. 312. And note it appears by the ſaid Preſident and Chronicle, that the King did examine the corruption of his Judges, before himſelf in the Parliament, and not by force of any Commiſſion.

Abſurdum eſt affirmare, recredendum eſſe non Judici.

An Oath before an Eccleſiaſticall Judge Ex officio.

The Ordinary cannot enforce a man to anſwer generall Articles *Ex officio.*

NOte, Paſch. 4. Jacobi, In the time of the Parliament the Lords of the Councell at Whitehall, demanded of Popham chief Juſtice, and my ſelf, upon motion made by the Commons in Parliament, in what caſes the Ordinary may examine any perſon Ex officio upon Oath; And upon good conſideration and view of our Books, we anſwered to the Lords of the Councell at another day in the Councell Chamber.

1. That the Ordinary cannot conſtrain any man Eccleſiaſticall, or Temporall, to ſwear generally to anſwer to ſuch interrogatories as ſhall be adminiſtred unto them; But ought to deliver to him the Articles upon which he is to be examined, to the intent that he may know whether he ought by the Law to anſwer to them: And ſo is the courſe of the Star-chamber and Chancery, the defendant hath the Copy of the Bill delivered unto him, or otherwiſe he need not to anſwer to it.

No man Eccleſiaſticall or Temporall ſhall be examined upon ſecret thoughts of his heart, or of his ſecret opinion: But ſomthing ought to be objected againſt him what he hath ſpoken or done: No Lay-man may be examined *Ex officio*, except in two Caſes, and that was grounded upon great reaſon, for Lay-men for the moſt part are not lettered, wherfore they may eaſily be inveigled and entrapped, and principally in Hereſie and Errors: And this appears by an Ordinance made in the time of Ed. 1. Title Prohibition.

Raſtall, the words of which Ordinance are, And *Quod non permittant, quod, alioqui laici in balliva ſua in aliquibus locis conveniant, ad aliquas recognitiones per juramenta ſua faſienda, niſi in Cauſis matrimonialibus & Teſtamentariis.* And the reaſon that the Eccleſiaſticall Judge ſhall examine them in theſe two Caſes, is for this; that Contracts of Matrimony, and the Eſtates of the dead are many times ſecret: And they do not concern the ſhame and infamy of the party, as Adultery, Incontinency, Uſury, Simony, hearing of Maſſe, Hereſie, &c.

And for this cauſe in theſe caſes and ſuch like, the Eccleſiaſticall Judge ought not to examine Partem ream, upon their Oath: For as a Civilian ſaid, that this was Inventio Diaboli ad deſtruendas miſerorum animas ad infernum: And in the Regiſter, fol. 36. 6. There is a Prohibition in this form, Præcipimus tibi quod permittas quod aliqui laici ad citationem talis Epiſc: aliquo loco conveniant de cætero ad aliquas recognitiones factas vel ſacramenta præſtanda, (the one is the expoſition of the other) niſi in caſibus matrimonialibus & teſtamentariis: And there is an attachment upon it, Pone per vadium talem Epiſc: quod ſit coram Juſticiariis noſtris, &c. oſtenſurum quare fecit ſummoniri, & per cenſuras Eccleſ. diſtringi laicas perſonas vel laicos homines & fœminas ad comparandum coram eo ad præſtandum juramentũ pro voluntate ſua ipſis invitis in grave Coronæ præ judiciũ & dignitatis

dignitatis noſtræ regiæ, nec non contra conſuetudinem Regni noſtri: Et habeas ibi Nomina plegiorum, &c. Teſte, &c. by which it doth appear that this was not only againſt the ſaid Ordinance, but alſo againſt the cuſtome of the Realm, which hath been, time of which, &c. but alſo in prejudice of the Crown and Dignity of the King: And with this agrees F. N. B. fol. 41. And vide the caſe reported by the Lord Dyer (but the caſe not printed) Trin. 10. Eliz. one Leigh an Attorney of the Common Pleas, was committed to the Fleet by the high Commiſſioners, in a cauſe Eccleſiaſticall, for this, that he had been at Maſſe, and refuſed to ſwear to certain Articles to be propoſed to him. And although in ſuch caſe Eccleſiaſticall Juriſdiction is ſaved by the Statute of 10 Eliz. yet they ought not in ſuch caſe to examine upon his Oath: And hereupon he was delivered by all the Court of Common Pleas.

And in Mich. 18. Eliz Dyer, fol. 175. in Hinds caſe, who would not ſwear Commiſſionariis Eccleſ. ſuper articulos pro uſura, & ea de cauſa commiſſus eſt Gaolæ de le Fleet, He was delivered by Habeas corpus per totam curiam.

Vide le Statute, 25 H. 8. cap. 14. Which is declaratory as to this point: It ſtandeth not with the right order of Juſtice nor good equity, that any perſon ſhould be convict and put to the loſſe of his life, good name, or goods, unleſſe it were by due accuſation, and Witneſſes, or by preſentment, verdict, confeſſion, or proceſſe of Out-lawry, &c. And it is not reaſonable that any Ordinary, upon ſuſpition conceived of his own fantaſy, without due accuſation or preſentment, ſhould put any Subject of this Realm in infamy and ſlander of Hereſie, to the perill of life, loſſe of good Name, or Goods (Et Paulo ante) the moſt expert and beſt learned man of this Realm, diligently laying wait upon himſelf, cannot eſcheu and avoid penalty & danger, &c. and if he ſhould be examined upon ſuch captious interrogatories, as is and hath been accuſtomed to be miniſtred by the Ordinaries of this Realm, in caſe where they will ſuſpect any man of Hereſie: And this was the Judgment of all the ſaid Parliament, ſee F.N.B. Juſtice of Peace 72. Lamb. in his Juſtice of Peace, 338. Crompt. in his Juſtice of Peace, 36. 6. In all which it appears, that if any be compelled to anſwer upon his Oath, where he ought not by the Law, that this is oppreſſion and puniſhable before a Juſtice of Peace, a Juſtice of Aſſize, &c. For this is an Article of charge; to enquire of all Oppreſſions: And as to that which was objected, that for a very long time, divers had been examined upon Oath in Eccleſiaſticall Courts; And as to this it was anſwered, that it might very well be, and not againſt Law, for the words of the Treatiſe or Ordinance, and of the Regiſter, are, Contra voluntatem eorum, &c. So that if any aſſent to it, and take it without exception, that is not Contra voluntatem eorum, But to enforce any to take it, who ought not to take it by the Law is a great oppreſſion: But if any perſon Eccleſiaſticall, be charged with any thing which is puniſhable by our Law, as for uſury, there he ſhall not be examined upon Oath, for this, that his Oath is evidence againſt him at the Common Law, and to do it incurs the penalty of the Statute, but witneſſes may be cited to teſtifie, Regiſter, title Conſult. F.N.B 53 d. Alſo by the Statute 2 H. 4 cap. 15. it is provided, that Dictus Dioceſſanus per ſe vel per Commiſſarios ſuos contra hujuſmodi perſonas, &c. Et ad omne juris effectum, publice & judicialiter procedat & negotium hujuſmodi, &c. terminet juxta Canonicas ſanctiones, which words Juxta Canonicas ſanctiones, gives them power to proceed according to their Canons, and excludes the Common Law, and by pretext of this in the caſes mentioned in the ſaid act, they examine as well Lay-people as Clerks,

Clerks, upon their Oathes concerning Hereſie, erroneous Opinions, &c. mentioned in the ſaid act in the Raign of H.4. H.5. H.6. Ed.4 R.3 H.7. unto the time of the ſaid act of 25 H. 8. and for this in the Reign of H.8. nor in the Raign of Ed.6. no Lay-man was examined upon his Oath, except in the ſaid two Caſes of Patrimony and Wills: But in the Raign of Queen Mary, this Act of 2 H.4. was revived, and then all the Martyrs who were burnt, were examined upon their Oathes: And afterwards by the 10 Eliz. the ſaid act of 2 H.4. is repealed, by which the Common-Law is in full force and effect: And for this cauſe all the pretence of poſſeſſion and practice which the Eccleſiaſticall Courts have had, is ſtrongly anſwered by this which hath been ſaid, that the words of the ſaid Treatiſe and Regiſter are; Contra voluntatem eorum, &c. And thoſe who have ſo taken it, have aſſented to it, and that ſtands with Law.

Math. Paris, 225, 226, 227. &c.

Note, that King John after he had murthered his Nephew Arthur, and Neice Ellenor, the Iſſues of his elder Brother Geffrey, after he had loſt Normandy, Aquitane, & Anjowe, after that his Commons for unjuſt vexation diſobeyed him, his Nobles revolted from him, the Clergy oppreſſed by him, and that he ſtood excommunicated by the Pope, and his Kingdom interdicted, he for his protection granted by his Charter of 13 Maii Anno Regni 14. ſubmitted himſelf to the obedience of the Pope: And after in the fourteenth year of his Raign, as one deſtitute of all ſuccour and ſafety, and from day to day in fear to loſe his Crown, by an other Charter he reſigned his Crown and Realm to the Pope Innocent, and his Succeſſors, by the hands of Pandolph his Legate, and took it of him again to hold of the Pope, which was utterly void, for this, that the Dignity is an inherent, inſeparable to the Royall blood of the King, and deſcendable to the next of blood of the King, and cannot be tranſferred to another, no more then a Duke, or Earl, or Baron, or other Dignity may tranſfer over their Dignity, for theſe are incidents inſeparable; Alſo the Pope was an Alien born, and therfore was not capable of Inheritance within England: By colour of which ſubmiſſion and reſignation, the Pope and his Succeſſors exacted great ſumms of the Clergy and Layity of England, Pro commutandis pœnitentiis, to maintain the height and dignity of the Pope: And for the better inriching of the Coffers of the Pope, Pope Gregory the ninth ſent Otho Cardinalis de Carcere Tulliano, into this Realm, when there was indignation betwixt H.3. and his Nobles, to collect money for the Pope, who did collect infinite ſumms of money, ſo that it was ſaid of him, Quod legatus ſaginatur bonis Angliæ, which Legate held his Councell at London, An. Dom. 1237. & 22 H. 3. And for the better finding out Offences which ſhould be redeemed with money, he with the aſſent of the Biſhops of England there aſſembled, made divers Cannons, amongſt which one was Jus jurandi Calumniæ in cauſis eccleſiaſticis cujuſlibet, & de veritate dicendi in ſpiritualibus quoque ut veritas facilius aperiatur & Cauſæ celerius determinentur Statuimus de Cætero præſtari in Regno Angliæ ſecundum Canonicas & legitimas Sanctiones obtenta in contrarium Conſuetudine non obſtante, &c.

By which Cannon it appears that the Law and Cuſtom of England was againſt this examination of the party Defendant upon his Oath, for it is ſaid, Statuimus de Cætero præſtari in Regno Angliæ, ſo that this was a new Law, and took its effect De cætero.

2. Obtenta in contrarium Conſuetudine non obſtante. And this very well agrees with the Regiſter and the ſaid Treatiſe De Regia prohibitione, And the other Authorities, That the Law and Cuſtom of England was,

was, that Lay-people in criminall causes, be they Ecclesiastical or Temporall, shall not be examined upon their Oath (only in causes matrimoniall and testamentary) otherwise it is of Clerks as is aforesaid: And for this, that it appears by the said Cannon it self, that this was against the Law and Custom of England, whence it follows that this Cannon shall not bind, for that the Law and Customs of England cannot be changed without an act of Parliament, for this, that the Law and Custom of England is the Inheritance of which he cannot be deprived without his assent in Parliament: And it appears in Linwood, cap. jure juranda fol 8.6. That Boniface Bishop of Canterbury, An. 1272. & 57 H.3. a little before the death of that King, made this Cannon, Statuimus quod Laici de subditorum peccatis & excessibus corrigendis per prælatos & judices ecclesiasticos inquiratur ad præstandum de veritate dicenda sacramentum per excommunicationis sententias. Si opus fuerit compellantur impedientes, vero ne hujusmodi juramentum præstetur per interdict. est excommunicatio sententia arceantur. In which Cannon, it is to be observed, that this extends to Lay-people; For as appears the Ecclesiastical Judge may examine those of the Clergy upon their Oathes: And note Linwood, cap. jure jurando, fol. 6. litera E. saith so, Hic dicitur causa editionis hujus tit. uti. viz. Prelati Ecclesiastici procedebant ad inquirendum, de criminibus & excessibus subditorum suorum, & laici (nota hic) suffulti potestate dominorum temporalium in hujusmodi inquisitionibus nolnerint jurare de veritate dicenda.

Note well what the cause was, why Lay-people refused to be examined for Crimes and Exccsse.

2. It appears, that the Judges of the Common Law, by their Prohibition did interdict, &c. as it appears by the Register and the other authorities, in the time of Ed. 1. and other Kings, Incroachments were made upon the Subjects which are here called Impediments, but now the Cannon saith, Impellat.

3. That wher by the Law they may examine Lay-people upon their Oath, In Causis matrimonialibus & testamentariis, Here Boniface makes this Cannon to extend to Peccata & excessus, which Cannon was utterly against the Law and customs of England. In like manner another was made by him at the same time, Linwood cap. de benef. fol. 231. which Cannon being made directly against the Judges, who did award procesle against them, if they did impose any pecuniary pain: And prohibites them the Juoges without fear of excommunication, the Cannon being against Law, prohibites them notwithstanding this thundring of Excommunication in all ages. And the scope and purpose of the said Cannon was to perplex the Subjects, and to enrich themselves by punishment pecuniary: And this is declared by act of Parliament made 9 Ed. 2. called Articuli Cleri. Si prælati imponant Pœnam pecuniariam alicui pro peccato, &c. Regia prohibitio locum habet.

Trin. 5. Jacobi.

Parpon. *Bonum publicum.*

NOte, the Law to regards the Weal-publike, that although that the King shall have the Suit solely in his name for the recovery of it, yet by his pardon he cannot discharge the Offender, for this, that it is not only in prejudice of the King, but in damage of the Subjects: As well for according of infinite Suits they cannot have private actions, and for that reason the Suit is given to the King, not only for himself, but also for all his Sub-

ſents, as if a man ought to repair a Bridge, and for default of reparation it falls into decay: In this caſe the Suit ought to be in the name of the King, and the King is ſole party to the Suite, but for the benefit of all his Subjects. And for this, if the King pardon it, yet the Offence remains; And in any Suit in the name of the King, for redreſſe of it, the Offender ought (notwithſtanding the pardon) to make and repair the Bridge for the benefit of the Weal-publick, but peraventure the pardon ſhall diſcharge the Fine for the time paſt: And with this agrees, 37 H. 6. 46. Plow. Com. in Nicols caſe 487. where the words of the Law are; If a Bridge or a High-way is repairable by the Subject, and is in decay, the pardon of the King ſhall not excuſe him which ought to do it, for this, that the other Subjects of the King have intereſt in it. But note, if the pardon in ſuch caſe ſhall diſcharge the Fine, for inaſmuch as the Offence cannot be pardoned, this cannot diſcharge the Fine, but only for the time before the pardon: But for the time after the pardon, without queſtion the Offender for his default ſhall be fined and impriſoned, the ſame Law, and A multo fortiori in caſe of Depopulation; for this is not only an Offence againſt the King, but againſt all the Realm, for by this the Realm is enfeebled, ſole and diſſolute people which are Enemies to the Common-wealth abound: And for this cauſe Depopulation and diminution of Subjects is a greater nuſance and offence to the Weal-publick, then the hinderance of the Subjects in their good and eaſe paſſage by any Bridge or High-way: And for this notwithſtanding the pardon of the King, he ſhall be bound to re-edifie the houſes of Husbandry which he hath depopulated, but peraventure for the time before the pardon he ſhall not be fined, but for the time after without doubt he ſhall be fined and impriſoned, for the Offence it ſelf cannot be pardoned, as in the caſe of a Bridge or High-way; Quia eſt malum in ſe: But this continues as to the Fine and Impriſonment at all times after the Pardon; But the penalty inflicted by the Statute that may be diſcharged, Quia prohibitum, vide 3 Ed. 3. tit. Aſſ. 443. where an Abbot was bound to repair a Bridge by Preſcription, and after the King by his Charter diſcharged him, which Charter was alleaged in a Quo warranto. And after the Abbot was molted at the Suit of the King, for default of reparation of the ſaid Bridge, and he pleaded the ſaid Charter and allowance: And notwithſtanding it was adjudged that he ſhould repair the ſaid Bridge, for this, that although the Suit be in the name of the King for the Offence, yet the King cannot diſcharge it, for this, that it ſhall be no preſjudice and damage of his Subjects: But when the King charges his Subjects for the making of a Bridge, or Caſtle, or Wall, &c. there the King may diſcharge in the Pontage, Murage, &c. But when one is bound by Preſcription or Tenure, &c. to repair a Bridge, &c. there the King cannot diſcharge of it. And all this appears in the ſaid Book.

Vid. 35 H 6. 29 per fort eſcue & 16. Ed. 3. grant 53.

And note, if one be bound to the King in a Recognizance for to keep the Peace againſt one and other the Liege people of the King, in this caſe the King, before the Peace broken cannot pardon and releaſe the Recognizance, as it is agreed in 11 H. 4. 43. 37 H. 6. 4. 1 H. 7. 10. And the reaſon is, although the Recognizance be made to the King ſolely, yet inaſmuch as this is made for the benefit and ſafety of the Subjects of the King, in ſuch caſe it cannot be diſcharged.

Note, no Treaſon can be made to do any thing that is Malum in ſe, but Malum prohibitum, 11 H. 7. 11. 3 H. 7. 39 H 6. 39.

Trin.

Trin. 5. Jacobi.

NOte, Commissions in English under the great Seal were directed to divers Commissioners within the Counties of Bedford, Bucks, Huntington, Northampton, Leicester, and Warwick, to enquire of divers Articles annexed to it: And the Articles were also in English, to enquire of Depopulation of Townes, converting of arrable Land into Pasture, &c. But the Commissioners should not have any power to hear and determine the said Offences, but only to enquire of them: And by colour of the said Commissions, the said Commissioners took many Presentments in English, and did return them into the Chancery, and after, Scilo Trin. 5. Jac. It was resolved by the two chief Justices, Wallmsley, Fenner, Yelverton, Williams, Snigg, Altham, and Foster, that the said Commissions were against Law for three causes. Commissions.

1. For this, that they were in English.

2. For that the Offences enquirable were not certain within the Commission it self but in a Schedule annexed to it.

3. For this, that it was only to enquire, which is against Law, for by this a man may be unjustly accused by Perjury, and he shall not have any remedy, for this, that it is not within the Statute of 5 Eliz. &c. Also the party may be defamed, and shall not have any traverse to it. Such a Commission may be granted only to enquire of Treason, Felony, &c. And no such Commission ever was seen, to enquire only.

At the Common Law Assises were not taken but before Justices in Eyre (who at vertute brevis, every seventh year, vide Britton fol. 2. and Bracton, lib. 5. & 11.) or in the Common Pleas: And this being a great molestation and trouble to the Recognitors of Assise, which grew for the most part was in use, for the ease of the Country, and expedition of Justice, it was provided by Magna Charta, cap. 20 by which it is enacted, Quod requisitiones de nova disseisina & de mort de ancester, non capiantur nisi in suis propriis Comitatibus, & hoc modo: Nos, vel (si extra regnum fuerimus) Capitales Justiciarii nostri mittent justiciarios nostros per unumquemque Comitatum semel in anno, qui, &c. capiant in Comitatibus illis Assisas predictas. And after was the Statute of Westminster 2. cap. 30. made, and by this it is provided, Quod assignentur duo Justiciarii jurati coram quibus & non aliis capiantur assisæ ad plus ter per annum. By which all Justices of Nisi prius were constituted of other Pleas, as well of one Bench as the other, Coram quibus Justiciariis & societate (viz.) Coram duobus Justiciariis, vel uno milite, &c. And by the same act the Justices of Nisi prius have power to give Judgment, &c. in Assises of Darrain presentment, and Quare Impedit, then came the Statute of 21 Ed. 3. De Finibus, cap. 4. and provided Quod in justitiones & recognitiones capiantur tempore vacationis, generally before Aliquo Justiciario de utroque banco coram quibus placitum deduct. fuerit associat sibi, &c. And after by the Statute of York, cap. 3. It is provided, that in plea of Land the Nisi prius shall be taken before one of the Justices, where the Plea, &c. and Chapter 4. That no other Pleas moved by Attachment, or disseisie shall be taken before any Justice, either of the one Bench or the other generally, be the Plea before them or not, &c. by the Statute 14 Ed. 3. cap. 15. Nisi prius may be taken in any Plea, real or personall before two, so that the one be a Justice of the one Bench, or a chief Justice, or a Serjeant sworn.

By

By the Statute De finibus, cap. 3. Juſticiarii ad aſſiſas capiendos aſſignati deliberant Gaolas in Comitatibus illis ſive infra libertates quam extra de priſonariis quibuscunque, vide le recital del Statute of 28 Ed. 1. de appellatis, which recites the Statute de fellonia, &c. but note that Felony includes Treſpaſſe in ancient time, vide Stamf. 57. The Statute of 3 H. 3. cap 7. gives power to Juſtices of Aſſiſe to hear and determine Treaſon, concerning falſe money: The Statute of 14 H. 6. cap. 1. provides that Juſtices of Niſi prius, have power in all the Caſes of Felony and Treaſon to give their Judgment as well where the party is acquitted of the Felony or Treaſon, as where he is attaint, and to award execution, &c.

The Statute of 28 Ed. 1. De appellatis gives power to Juſtices of Aſſiſe to try the appeals of approvers.

Juſtices of Aſſiſe by the Statute 34, & 35. H 8. cap. 14. May write to the Clerk of the Crown De banco Regis, to certifie the firſt condiction in their own name; but where Juſtices of one County or Circuit write to other to certifie the attainder of a Principle, the beſt form is in the name of the King, 2, & 3. Ed. 6. cap. 24.

By the Statute De Articulis ſuper chartas c. 10. & 4 Ed. 3. c. 11. & 7. R. 2. Juſtices of Aſſiſe may hear and determine Conſpiracies, falſe informations, and Mal-procurers of Inqueſts and Juries to any Plaint, without Writ and without delay, and of Confederacies, and Champerties, and Maintainers, Bearers, and Alliances by Bond, &c.

By the Statute of Northampton, 2 Ed. 3. cap. 3. Juſtices of Aſſiſe have power to hear and determine the Statute concerning Armor; alſo to puniſh the Juſtices of Peace, and others, who have not done their Office in ſuch like caſes, &c.

Juſtices of Aſſiſe ought twice in the year to proclaim the Statute 32 H. 8. and other Statutes againſt unlawfull Maintenance, Champerty, Imbracery, and unlawfull Retainers.

By the 3 H. 7. cap. 1. Juſtices of Aſſiſe take Bail of him who is acquit of Murther within the year, to anſwer the appeal of the party.

By 33 H. 8. Juſtices of Aſſiſe cauſe the Statute againſt unlawfull Games, to be proclaimed in their Circuit.

Juſtices of Aſſiſe make execution of the Statute, 13 H. 4. cap. 7. of Ryots made in their preſence, upon pain of a hundred pound, and by 2 H. 5. cap. 8. Commiſſion ſhall be awarded to enquire of the default of Juſtices of Aſſiſe and of the Peace.

By the Statute of Weſtminſter 2. cap. 37. & 2 Ed 3. cap. 5. Juſtices of Aſſiſe ought to enquire of return or not return of Sheriffs.

Juſtices of Aſſiſe to enquire of all points of the Statute of 23 H. 6. cap. 10. concerning Sheriffs, under Sheriffs, and their Clerks, Coroners, Stewards of Franchiſes, Bayliffs and Guardians of Priſons for their extortion, and for delivering of them who are not bayable, and for detaining thoſe who ought to be bayled, 2 Mariæ Dyer 99. Juſtices of Aſſiſe held plea in appeal of Murther, by W. 2, c. 3. H. 7. and of Robbery by Commiſſion for Gaol-delivery.

23 Ed. 3. cap. Juſtices of Aſſiſe may enquire of default, &c. of puniſhment of Victualers, &c. who ſell at unreaſonable prices.

Note, Juſtices of Oyer and Terminer cannot by this authority enquire but of ſuch, who are indicted before themſelves, for their Commiſſion is, Ad inquirendum, audiendum & terminandum: But Juſtices of Gaol-delivery may arraign a Priſoner indicted before others, the words of their Commiſſion are, Ad Gaolas, Gaolam de B. de priſonaribus in ea exiſtentibus hac vice deliberandum, ſecundum leges, &c. Brook Title Commiſſion, 3 Mar.

3 Mar. 24. 4 Ed. 3. c. 2. That Juſtices of Gaol-delivery, deliver Priſoners indicted before the Guardians of the Peace. And by the Statute of 1 Ed. 6. cap. 7. New Commiſſioners of Gaol-delivery, But this doth not extend to Indictments, or conviction before the Commiſſioners of Oyer and Terminer: And the reaſon of this is, for this, that the Indictments and proceedings before Juſtices of Oyer and Terminer, after the Oyer determined, ought to remain in the Kings Bench: And the Records before Juſtices of Gaol-delivery remain with the Cuſtos Rotulorum, vide Brook, Title Commiſſion, 12. 38 H. 8. Title Oyer & Terminer, 44. Ed. 2. 31.

Cuſtoms, Subſidies, and Impoſitions.

NOte, upon conference between Popham chief Juſtice, and my ſelf, upon a Judgment given lately in the Exchequer, concerning the impoſition of Currants: And upon conſiderations of our Books, and of Statutes to this purpoſe; It appeared to us that the rule of the Common Law is the Regiſter, Title Ad quod Damnum, and F. N. B. 222. a. quod patria magis ſolito non oneretur ſeu gravetur: Alſo there is another Rule, that the King may charge his people of this Realm without ſpeciall aſſent of the Commons, to a thing which may be of profit to the common people, but not to their charge; As is held in the 13 of H. 4. 16. Et Statutum de Tallagio non concedendo, Nullum Tallagium, ſeu Auxilium per nos, ſeu heredes noſtros ponatur ſeu levetur abſque voluntate & aſſenſu Parliamenti. Et Magna Charta, cap. 30. Omnes Mercatores (Niſi publice antea Prohibiti fuerint) habeant Salvum & ſecurum conductum abire de Anglia & venire in Angliam, & morari & ire per Angliam, tam per terram quam per aquam, ad eniendum & vendendum ſine omnibus malis Toluetis per antiquas & rectas conſuetudines, præterquam in Tempore Guerræ, which Statute hath been confirmed more then thirty times by ſeverall acts of Parliament, vide le Statute, 25 Ed. 1. 3. Ed. 1. in turri, 9 Ed. 3. cap. 1, & 2. 14 Ed. 3. 2. 25 Ed. 3. cap. 2. &c. The effect of which is, that every Merchant of this Realm, or other, may freely buy, ſell, and paſſe the Sea with all their Merchandiſes, paying the Cuſtoms of ancient time uſed. Queen Mary put an impoſition upon Cloathes, which the 1 Eliz. Dyer 165. was moved and not reſolved, vid. 31 H. 8 Dyer fol. 43. & 1 Eliz. 165. Magna Cuſtuma & parva Cuſtuma, vide 9 H. 6. 12. & 35. And note there the ſaying of Babington. Note the 1 Eliz. Dyer 165. there was Antiqua ſive magna Cuſtuma at the Common Law, ſcil. for Wools, Wool-fels, and Leather, and this was equall to ſtrangers as Denizens. And in the time of Ed. 1. a Merchant ſtranger grants over the ſaid Cuſtoms 3 s. 4 d. which is called Nova ſeu parva Cuſtuma.

Upon all which and divers Records which we had ſeen, it appeared to us, that the King cannot at his pleaſure put any Impoſition upon any Merchandiſe to be imported to this Kingdom, or exported, unleſſe it be for advancement of Trade and Traffick, which is the life of every Man, Pro bono publico. As if in forraign parts any impoſition is put upon the Merchandizes of our Merchants, Non pro bono publico, and for to make equality, for the purpoſe to advance Trade and Traffick, the King may put an Impoſition upon their Merchandizes, for this is not againſt any of the Statutes which were made for advancement of Merchandize, or of the Statute of Magna Charta, cap. 30. which is, Si aliqui Mercatores, de terra contra nos guerrina inveniantur in terra noſtra in principio guerræ attachientur, &c. Quo modo mercatores terræ noſtræ tractantur qui nunc inveniantur in terra illa, contra nos guerrina: Et ſi noſtri ſalvi ſunt ibi, illi ſalvi ſunt in terra noſtra; for the end of all ſuch reſtraints is, Salus populi: And ſo in the caſe of Currants, which was now lately adjudged in

the Exchequer: Alſo in the caſe of Cuſtomer Smith, which was adjudged in the Exchequer, in the Raign of Queen Eliz. both the Impoſitions were impoſed, upon the ſaid reaſon he make equality, for this was the truth of both caſes (Scil.) The advancement of Trade and Traffick, and for this cauſe ſuch Impoſitions were lawfull.

And it was clearly reſolved by us, that ſuch Impoſition ſo put, cannot be demiſed or granted to any Subject, for this, that it is to augment and decreaſe, or be quite taken away upon juſt occaſion for advancement of Merchandize. And this was one of the reaſons in Cuſtomer Smiths caſe, that it could not be enuſed, alſo it was aſſeſſed after the Demiſe.

And although that the King may prohibite any perſon in ſome caſes with ſome Commodities to paſſe out of the Realm, yet this cannot be where the end is private, but where the end is publick, Viz. To reſtrain the perſon, for this, that, Quam plurima nobis & Coronæ noſtræ prejudicialia in partibus exteris proſequi intendit, and to reſtrain any Merchandizes either in time of Dearth, or in time of War, for Neceſſitas eſt lex temporis.

It appeared unto us alſo, that at the Common Law no Cuſtom was paid, but only for Wools, Wool-fels, and Leather, which is called in Magna Charta, Recta conſuetudo, and all others are there called Mala toltetæ, which in the Statute De Tallagio non concedendo, is called Male. And at the beginning of the Raign of Kings, it hath for a long time been uſed, by authority and conſent of Parliament, to grant to the King certain Subſidies of Tunnage and Poundage, for terme of his life, which began in ſuch form, 2, & 3. H. 5. in the 31 H. 6. cap. 8. & 12 Ed. 4. cap. 5. for the Defence of the Realm, and maintenance of certain Wars, by act of Parliament, which proves, that the King by his own power cannot impoſe it, but by conſent of Parliament; but ſuch ſubſidy of Tunnage and Poundage might be granted by the King ſo long as he lived; for this, that this is limited and given to the King in certain: But an Impoſition put for equality, as hath been ſaid, hath not any certain continuance, but is to be augmented, diminiſhed, or taken away, for the benefit of the Commen-wealth; And for that cauſe it cannot be demiſed, vide 31 H. 8: Dyer 43. 1 Mar. D. 92. 1 Eliz. D. 165. 2, & 3. P. & M. D. 128. 12 Eliz. D. 296. 23. Eliz. D. 375. 45. Ed. 3. cap. 4. 27 Aſſ. pl. 44. Regiſter 192. &c.

Vide M. Ch. cap. 30. they are called Conſuetudines & per vocabulum artis, they are called Cuſtuma, vide le Stat. 51 H. 3. Title Exchequer in Rakall: It appears that there were ancient Cuſtoms, and thoſe were for Wools, Wool-fels, and Leather, vide le Statute, 9 Ed. 3. cap. 2. That all Charters, and Letters Patents made againſt free Trade and Traffick, made, or to be made, are void.

Vide Forteſc. in his Comment of the Laws of England, cap. 36. fol. 43. Neque Lex per ſe vel per miniſtros ſuos Tallagia, ſubſidia aut quævis alia onera imponit Legeis ſuis aut leges eorum mutat, vel novos condit ſine conceſſione & aſſenſu totius Regni ſui in Parliamento ſuo expreſſo, & vid. fol. 13. cap. 9.

And note for the benefit of the Subject, the King may make an Impoſition or Toll within the Realm, to repair High-waies, Bridges, and to make Walls for defence: But then the ſumm impoſed ought to be proportionable to the benefit: And this appears the 13 H. 4. 16. Dec. the Impoſition for equality ought to be for the publike good, ſee the Charter, 31 Ed. 1. which is called Charta mercatoria ex Rot. mercator. an. 31. Ed. 1. n. 42. Patents, 3 Ed. 1. n. 1 & 9. de ſacco lanæ dimidium marcæ; laſta coriorum, 1 Mark. &c. Fines 3 Ed. 1. n. 24. intus & non in dorſo, vide Rot. Parliament. an. 13. Ed. 3. No new Inhanſment of Cuſtoms without common

common conſent: And in 22 Ed. 3. n. 8. againſt new Cuſtoms and Impoſitions, and that Merchants may freely paſſe, &c. And in the Parliament An. 8 H. 6. n. 29. Amongſt the new Impoſitions granted by H. 5. upon Merchandizes coming to Burdeaux: And Parliament 28 H. 6. n. 35. the Duke of Somerſet accuſed for cauſing the King to grant unto Sir Peirce Bracy an Impoſition of Wines.

Parl. 9. R. 2. n. 30. againſt a Patent made to the Lieutenant of the Tower, by colour of which he took Cuſtome of Wine, Oyſters, and other Victuals to be void.

29 Ed. 3. 11. n. Ex Rot. Parliamenti, Subſidy of Wools granted for ſix years, ſo as during the ſame time no other aid or Impoſition be laid upon the Commons.

Parliament 5. Ed. 3. n. 17, 18, 19. againſt new Impoſitions upon Staple Commodities, Parl. 22 Ed. 3. n. 31. againſt Alnage of Worſteds, 5 Ed. 3. n. 163. againſt all new Impoſitions, and 5 Ed 3. n. 191. 38. Ed. 3. n. 26. Rot. Parl. againſt unreaſonable Impoſitions.

Parl. 7. R. 2. n. 35, 36. 9 R. 2. n. 30. No Inquiſitions or Rates without conſent of Parliament.

Note 2 R. 2. Parl. apud Gloceſtriam, act 25, Subſidy paid for defenſive Wars, not for invaſive, 1. R. 2. Parl. accord, 1 R. 3. againſt Benevolence; vide Clauſ. 4. Ed. 3. n. 22. bis.

Libels. Star-chamber.

IN the caſe in the Star-chamber, between Edwards a Phyſitian Plaintiff, and Wooton Doctor in Phyſick Defendant.

The Caſe was, That Doctor Wooton writ to Edmunds an infamous, malicious, ſcandalous, obſcæne Letter, to which he ſubſcribed his name: And this he ſealed and directed, To his loving Friend Mr. Edward Speed this: And after the ſaid Doctor publiſhed and diſperſed to others a great number of Copies of the ſaid Letter.

And it was reſolved by the Lord Chancellor Egerton, the two chief Juſtices, Et per totam Curiam, that this was a ſubtle and dangerous kind of Libell: For inaſmuch as the writing of a private Letter to another, without any other publication, the party to whom it is directed cannot have an action Sur le caſe, for this, that no action lies but when it is publiſhed to others to the ſcandall of the Plaintiff, as it hath been often times adjudged, action lyeth.

The Doctor thought that this could not be puniſhed in any manner; But it was reſolved, that the ſaid infamous Letter, which in Law is a Libell, ſhall be puniſhed (although it was ſolely writ to the Plaintiff without any other publication) in the Star-chamber, for that it is an offence to the King, and is a great motive to revenge, and tends to the breaking of the Peace and great miſchief: And for that reaſon it was neceſſary, that it ſhould be puniſhed either by Indictment, or in the Star-chamber, to prevent ſuch occaſions of miſchief. But in the caſe at the Bar, the diſperſing of Copies of it, or the publication of the effect of it, aggravates the offence, and makes it a new offence: For, for that alſo the party may have an action ſur le Caſe.

Note, that by the Civill Law, if any perſon hath diſabled himſelf to bear any Office, or for any other purpoſe made a Libell againſt himſelf, he ſhall be puniſhed for it. And ſo it ſeems to me, he ſhould be in the Star-chamber; for this is an offence to the King and the Common-wealth: And without queſtion, although that the Doctor ſubſcribed his name to the ſaid Letter, yet the ſaid Letter importing the ſcandalous matter of a Libell is in the Law a Libell.

Note,

Nota, the Law of the Lydians is, that he who ſlanders another ſhall be let blood in the Tongue, and he who hears it and aſſents to it, in the Eare, &c.

Mich. 5. Jac.

Reſervation. INter Johannem Wooton quer. & Johannem Edwin Defendentem. In Replevin the Defendant avowed, and the Plaintiff demurred; and the Caſe was thus.

William Hawes was ſeiſed in Fee of a Meſſuage, and fifty five acres of Land, five acres of Meadow, and ſix acres of Paſture in Fromanton, in the County of Hereford: And 27. Junii, 28 H.8. by Indenture demiſed the Tenement aforeſaid, to Nicholas Traheron, for ſeventy nine years, Reddendo inde annuatim præfato Gulielmo Hawes, & aſſignatis ſuis 26 s. 8 d. at the Feaſts of the Annunciation, and St. Michael, by even and equall portions: And after the Leſſor dyed, and the Reverſion deſcended to William his Son, under whom the ſaid John Edwin claimed.

And the ſole point in this caſe was, If the Rent reſerved in this caſe ſhall go to the Heir, or ſhall be determined by the death of the Leſſor, for if the Leſſor had reſerved the Rent to him without more, this ſhall determine by the death of the Leſſor: and the addition of theſe words (And his Aſſignes) ſhall not enlarge the reſervation, for if the Leſſor had aſſigned the Reverſion over, yet the Rent ſhall determine by his death, for the Aſſigns cannot have the Rent longer then the Leſſor himſelf ſhould have it; And the Leſſor himſelf hath it but for tearm of his own life, vide 18. Ed. 3. title Aſſ. 86. 10 Ed. 4. 18. 27 H. 8. 19. per Audley & vide Hill. 33. Eliz. Rot. 1341. In this Court in a Replevin, inter Richmond & Butcher, where the cauſe that Butcher avowed for a rent as Heir to his Father, upon a Demiſe made by his Father of certain Lands for one and twenty years, by theſe words, Reddendo & ſolvendo proinde duranto predicto termino 21. annorum prefato (Patri) Executoribus & aſſignatis ſuis 10 l. legalis monetæ Angliæ, &c. ad feſta, &c. And it was adjudged, that by this reſervation the Heir ſhould not have the Rent, for that the reſervation was made to the Father, his Executors and Aſſigns, and not to his Heirs, &c.

Mich. 5. Jac.

Corone, Buggary. Nota, Bugarone Italice, *is a Buggerer, and* Buggerare *is to* buggar, *ſo Buggary cometh of the Italian word.*

THe Letter of the Statute of the 25 H. 8. cap. 6. If any perſon ſhall commit the deteſtable ſin of Buggary with Man-kind, or Beaſt. &c. it is Felony, which act being repealed by the Statute, 1 Mar. is revived and made perpetuall by 5 Eliz cap. 17. And he ſhall loſe his Clergy.

It appears by the ancient Authorities of Law, that this was Felony; but they vary in the puniſhment, for Brit. who writ 5 Ed. 1. cap. 17. ſaith, that, Soceres, Sodomers & Heretiques ſhall be burnt, F.N.B. 269. a. agrees with it: But Flet. lib. 1. cap. 35. Chriſtiani autem Apoſtati, ſortilegi & hujuſmodi

juſmodi detractari debent & comburi (in this he agrees with Britton, Pecorantes & Sodomitæ terra vivi Suffodiantur.) But in the ancient Book called the Mirror of Juſtice, vouched in Plow. Com. in Fogoſſes caſe, the Crime is more high, for there it is called Crimen læſæ Majeſtatis, a ſin horrible, committed againſt the King: And this is either againſt the King Celeſtiall, or Terreſtiall in three manners; by Hereſie, by Buggary, by Sodomy. Note, that Sodomy is with Man-kind, and it is Felony. To make that Offence Oportet rem penetrare, & ſemen naturæ emittere, & effundere, for the Indictment is Contra ordinationem Creatoris & naturæ ordinem rem habuit veneream, dictumque puerum carnaliter cognovit. Every of which (rem habuit, & carnaliter cognovit) imply penetration and emiſſion of ſeed: And ſo it was held in the caſe of Stafford, who was attaint in the Kings Bench and executed. Pæderaſtes amator puerorum, wherof the Greek word is, Παιδεραστία; Buggary with Boyes, vide Rot. Parliament. 50. Ed. 3. 58. A Lumbard did commit the ſin that was not to be named: So in Rape there ought to be penetration and emiſſion of Seed, vide Stamford, fol. 44. Which Statute makes it Felony, he who procures, &c. or receives the Offender, &c. is accellary.

The words of the Statute of Weſt. 1. cap. 34. If a man ravish a woman, 11 H. 4. 18. If one aid another to commit Rape, and if he be preſent, he is principle in the Buggary, vide Leviticus 18. 22. & cap. 10. 13. 1. Cor. 6.

NOte, in the Book of Doctor Coſines, intituled, an Anſwer, &c. to the Abſtract, and publiſhed 1584. And a Pamphlet now lately publiſhed by Doctor Ridley, they would obtrude upon the World, That forasmuch as that now by the act 10 Eliz. cap. 1. all Spiritual and Eccleſiaſticall power within this Realm is annexed to the Crown, and the Law by which they determine cauſes, which belongs to their Cognizance, is the Eccleſiaſticall Law of the King: That for that cauſe no Præmunire lies againſt any Spirituall Judge for any Cauſe whatſoever. And ſome other of their Profeſſion have ſome other reaſons to confirm it.

Præmunire. Vide 15 H. 7. 9. Præmunire was at the Common Law.

1. That when the Statute of Præmunire was made, Viz. in the Raign of the Kings, Ed. 3. & R. 2. then the Pope uſurped Eccleſiaſticall Juriſdiction, although that De jure it belonged to the King. And therfore forasmuch as the King is as well De facto, as De jure, ſupream head of all, as well Eccleſiaſticall as Temporall; now the Cauſe being changed the Law is changed alſo.

2. The concluſion of the Writ of Præmunire is in Domini Regis contemptum & præjudicium, & dictæ Coronæ & dignitatum ſuarum læſionem & exhæredationem manifeſtam, & contra formam ſtatuti, &c. Which proves that the Juriſdictions ſhall be now ſevered and united to the Crown; For that which is united to, and derived from the Crown, cannot be ſaid contra Coronam & dignitatem Regis,

3. The Court of high Commiſſion is the Court of the King, and is by force of an act of Parliament, and Letters Patents of the King: And for this, although it may be ſaid, that the Conſiſtory Courts are Curiæ epiſcoporum, yet the Court by force of high Commiſſion is the Court of the King: And for that reaſon their proceedings ſhall not be ſubject to a Præmunire.

4. This new Court is erected by act of Parliament, and Letters Patents of the King: And for this, where the Statute of R. 2. ſpeaks, De Curia Romana ſeu alibi, &c, This (alibi) cannot extend to a Court erected by Parliament, An: 10. Reg: Eliz.

But to theſe Objections it was anſwered and reſolved by divers Juſti-

ces in this very Term, that without question the Statutes 27 Ed. 3. 16 R. 2. &c. De præmunire, are yet in force: And all such proceedings, by colour of Ecclesiasticall Law before any Ecclesiasticall Judges who were in danger of Præmunire, before the said act 1 Eliz. are now in case of Præmunire after the said act; be it before the Commissioners by force of high Commission, or before Bishops or other Ecclesiasticall Judges: For the said acts of Præmunire are not repealed by the said act, 1 Eliz.

And as to the first and second Objections, it was answered, that true it is, that the Crown of England hath as well Ecclesiasticall as Temporall Jurisdiction, De jure annexed to it, as appears by the Resolution in Cawdries case from age to age: And although this was De jure, yet when the Pope became so potent and powerfull, he did usurp upon the Kings Ecclesiasticall Jurisdiction within this Realm; but this was but meer usurpation (for the King cannot be put out of the possession of any thing which belongs to his Crown:) And for this reason all the Kings of this Realm Totis viribus proinde, for the establishment of their temporall Law, by which they inherit the Crown, and by which they govern their Subjects in Peace, and punish those who are rebellious, or who commit great Offences against them and their Crown: And they were always jealous least any part or point of their temporall Law should be incroached upon: And for this, if the Ecclesiasticall Law usurp any thing upon the temporall Law, this was severely punished: And the Offender esteemed and adjudged an Enemy to the King by the ancient Statutes; and every one might have killed him before the Statute 5 Eliz. and this is the reason for why; although both Jurisdictions belong to the Crown, yet inasmuch as the Crown it self is directed descendable by the Common Law, and all Treason against the Crown punished by this Law; for this cause, when the Ecclesiasticall Judge usurps upon the Common Law, it is said Contra Coronam & dignitatem &c. And all the Prohibitions directed to the high Commissioners from year to year, from the time of the making of the said Statute 1 Eliz. doth conclude, Contra Coronam & dignitatem Regiam.

For as it was resolved by all the Justices, Pasch. 4 Jac. Regis, est contra Coronam & dignitatem Regiam, when any Ecclesiasticall Judge doth usurp upon the temporal Law, because, in all those writs it appeareth, the interest or cause of the Subject is drawn ad aliud examen, that is, when the Subject ought to have his cause ended by the Common Law, whereunto by birth-right he is inheritable, he is drawn in aliud examen (viz.) to be decided and determined by the Ecclesiasticall Law: And this is truly said, Contra Coronam & dignitatem Regiam. And this appears by all the Prohibitions (which are infinite) which have been directed to the high Commissioners and others after the said act 1 Eliz. A fortiori, he who offends in a Præmunire shall be said to offend Cont a Coronam & dignitatem regiam: And this in effect answers to all the aforesaid Objections; but yet other particular answers shall be given to every of them.

As to the third, although the Court by force of high Commission is the Court of the King, yet their proceedings are Ecclesiasticall: And for this, if they usurp upon the Temporall Law, this is the same Offence which was before the said act 10 Eliz. For this was the end of all the ancient acts, that the Temporall Law shall not in any manner be emblemished by any Ecclesiasticall proceedings.

As to the fourth, although it be a new Court, yet the ancient Statutes extend to it within this word Alibi, and divers new Bishopricks were erected in the time of H. 8. And yet there was never any question, but that

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the ancient Acts of Præmunire extendes to them.

But to answer to all the Objections aforesaid, founded upon the said Statute of 1 Eliz. out of the words and meaning of the same act; For whereas the act 1 Eliz. repealed the Statute 1 & 2 P.M. cap. 8. There is an expresse Proviso in the said act 1 Eliz. that that shall not extend to repeale any clause, matter, or sentence contained or specified in the 1 & 2. P. M. which in any sort toucheth or concerneth any matter or cause of Præmunire: But that all & that which doth touch or concern any matter of Præmunire, shall stand in force and effect: And the clause of 1 & 2. P. M. which concerns matter of Præmunire, is such, every person who by any processe out of any Ecclesiasticall Court of the Realm, or out of it, or by pretence of any Spirituall Jurisdiction, or otherwise, contrary to the Lawes of the Land, inquiet or molest any man for any thing, parcell of the possession of any Religious house, shall incur the danger of the act of Præmunire, An. 16. R. 2. which proves that as well the act 1 & 2. P.M. as the act 1 Eliz. which erects the high Commission Court, which refers to the act of 1 & 2. P. M. intends by expresse words, that the act 16 R. 2. of Præmunire shall stand in force: Also the act of 1 Eliz. revives the act of 25 H. 8. cap. 10. which makes a Præmunire in a Dean and Chapter, &c. for not electing, nor certifying, or not admitting of any Bishop elected: by which it is directly proved, that the act 1 Eliz. never intended to take away the offence of Præmunire, but expresly provided for it, as appears by that which hath been said.

But then we are to note in what cases a Præmunire lies, in what not. Prima Regula.

And for this that it is to penall, it is necessary that it should be explained and made known.

In all Cases, when the cause originally belongs to the Cognizance of the Ecclesiasticall Court, and Suit is prosecuted there, in the same nature as the Cognizance belongs to them (although in truth the cause, all circumstances being disclosed, belongs to the Court of the King, and to be determined by the Common Law) yet no Præmunire lies in that case, but a Prohibition. As if Tythes are severed from the nine parts, and are carried away: if the Parson sue for the subtraction of these Tythes in the Spirituall Court, this is not in the case of Præmunire, for it may be that the Plaintiff did not know that they were severed from the nine parts, nor that they were carried away: Nor may the Ecclesiasticall Judge know any thing of it: And although that the Defendant plead this, yet the Ecclesiasticall Court may proceed to try the truth of it without danger, vide 10 H. 4. 2. according with this opinion; for if a Parson sue for Tythes of Wood, suggesting that they were Silvæ cæduæ, under the age of twenty years, where in truth they were above the age of twenty years: (In which case by the Statute of 45 Ed. 3. Tythes ought not to be paid) yet a Prohibition lyeth and no Præmunire. Regula prima

But although that the cause originally may appertain to that Cognizance of the Ecclesiasticall Judge, yet if he sue for it in the nature of a Suit, which doth not belong to the Ecclesiasticall Court, but to the Common Law, there a Præmunire lyeth: as in the case put before, If the Parson after the severing of Tythes, will in any Ecclesiasticall Court within this Realm, sue for carrying away his Tythes severed from the 9. parts, which action by matter apparent to the Ecclesiasticall Court, appertains to the Common Law, In fact both the Actor and the Judge incurs the danger of a Præmunire. Also so was it adjudged in 17 H. 8. as Spilman reports it: One Turberville sued a Præmunire against a Parson, who by citation convents him into the Ecclesiastical Court within this Realm, Regula secunda.

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and there Libell'd againſt him for taking of Tythes which were ſevered from the nine parts, and the Parſon was condemned, and had Judgment that he ſhould be out of the protection of the King, and forfeit all his Lands, Goods, and Chattels, and his body to perpetuall Impriſonment, and damages to the party. So if a Portuary be delivered to a Parſon, and after the party re-take it, if the Parſon ſue for this as for a Portuary to him delivered and carried away, he is in caſe of Præmunire; but after the repriſall, if he ſue for it as Portuary not executed, in nature of a Suit, which belongs to Court Chriſtian, upon the truth of the caſe there is cauſe of Prohibition, and no Præmunire lies, vide 10 H. 4. 2. So the caſe which hath been put of ſuit for tythes of Wood, if the Parſon ſue for tythes of wood above 20. years growth, ſo that it appears by the Libell, that the Cognizance of this caſe doth not belong to Court Chriſtian (viz) to the Court of the Archbiſhop of Canterbury, the Præmunire lies as you may ſee in the Book of Entries, tit. Diſmes, fol. 221. But the tit. Prohibition, fol. 449. Diviſione Diſmes. pl. 2, 3, 4, 5, & 6. if the Suit be Pro ſilva cædua, &c. So that as the Suit is framed the Cognizance belongs to Court Chriſtian, although that the truth be otherwiſe, there a Prohibition lies, and no Præmunire. For when the cauſe originally belongs to the Cognizance of the Eccleſiaſticall Court, although that hold plea of any incident to it, which belongs to the Common Law, there Prohibition and not Præmunire.

Regula tertia. When the cauſe originally belongs to the cognizance of the common Law, and not to the Eccleſiaſticall Court, there although they libell for it according to the courſe of the Eccleſiaſticall Law, yet the Præmunire lyeth, for this, that this drawes the cauſe which is determinable at the common Law, Ad aliud examen, viz. to be decided by the Civill or Eccleſiaſticall Law; and ſo deprives the Subject of the benefit of the common Law, which is his birth-right: And with this agrees the Book of Entries, Title Premunire, fol. 229. b. & 430. a. where it is put for a Rule, Quod Placita, Querelæ & poſſeſſiones terrarum & tenementorum tranſgr. debitorum & aliorum conſimilium infra Regnum Angliæ illat. ad Dominum Regem ad Regalem Coronam & dignitates ſuas ſpecialiter, & non ad forum Eccleſiaſticum pertinent. Quidam I. R. &c. machinans Dominum Regem & Coronam & dignitates ſuas exheredare, & cognitionem quæ ad Curiam Domini Regis pertinet, ad aliud examen infra Regnum ſuum Angliæ in Curiam Chriſtianitatis coram A. W. Official. &c. trahere, &c. quendam articulum ad proſequendum ipſum R. in eadem Curia Chriſtianitatis coram præfato Officiali pro debito 20 l. & ipſum R. in eadem Curia præfato I. A. inde reſponſum citari, &c. So that if the originall cauſe be temporall, although that they proceed by Citation, Libell, &c. in Eccleſiaſticall manner, yet this is in danger of Præmunire: And the reaſon of this Offence is expreſſed in the Writ, for this, that he endeavours to draw Cognitionem quæ ad Curiam Domini regis pertinet, ad aliud examen, which is as much as to ſay, that the Debt, the Cognizance whereof belongs to the Court of the King, and to be determined by the common Law, he intends by the Originall Suit to draw it to be determined by the Eccleſiaſticall Law.

And note, in the Indictment of Præmunire againſt Cardinall Wolſey, Mich 21 H. 8. it is ſaid, Quod prædictus Cardinalis & intend: finaliter antiquiſſimas Angliæ leges penitus ſubvertere & enervare, univerſumque hoc Regnum Angliæ & ejuſdem Angliæ populum, legibus imperialibus, vulgo dictis legibus Civilibus & eorum legum Canonibus in perpetuum ſubjugare

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& ſubjicere, &c. and this is included within theſe words, Ad aliud examen trahere, viz. to decide that by the Civill and Eccleſiaſticall Lawes, which is determinable by the common Law: And upon this was a notable caſe in Hil. an. 25 H. 8. the caſe of Nich. Biſhop of Norwich, againſt whom, he then being in the cuſtody of the Marſhalſey, the Kings Attorney preferred a Bill of Præmunire: And the matter of the Præmunire was ſuch. Within Thetford in the County of Norfolk hath been De tempore cujus, &c. ſuch Cuſtom, that all Eccleſiaſticall Cauſes ariſing within that Town, ſhould be determined before the Dean of the ſame Town, who hath within it peculiar Juriſdiction; and that none in the ſame Town ſhall be drawn in plea in any other Court Chriſtian for Eccleſiaſticall Cauſes, unleſſe before the ſame Dean: And if any be againſt the ſaid Cuſtome drawn in ſuit before any other Eccleſiaſticall Judge, and this be preſented before the Major of the ſame Town, that ſuch party ſhall forfeit 6 s. 8 d. And that one ſuch ſued in the Conſiſtory of the ſaid Biſhop, for a thing ariſing within the ſaid Town of Thetford, and this was preſented before the Major, for which he hath forfeited 6 s. 8 d. the ſaid Biſhop cited the ſaid Major to appear before him at his houſe in Hoxne, in Suffolk, generally Pro ſalute animæ, and upon appearance libelled, Pro parole upon all the matter, and enjoyned him upon pain of Excommunication to annul the ſaid Preſentment: And the ſaid Biſhop had Councell learned aſſigned him; And they objected, that as well the ſaid Preſentment as the ſaid Cuſtom were for divers cauſes void, and therefore it cannot be ſaid, Contra Coronam & dignitatem Regiam, nor hath the Biſhop drawn the party Ad aliud examen, for it ought not to be examined in any Court.

2. They objected, that the Court of the Biſhop was not intended within the act of 16 R. 2. 32. but In Curia Romana aut alibi, and this alibi ought not to be intended out of the Realm, but it was reſolved by Fitz-James chief Juſtice, & per totam Curiam; That be the Cuſtom and Preſentment good or not, this is a temporall thing and determinable by the common Law, and not examinable in the Spirituall Court; and for this the Biſhop in this caſe hath incurred a Præmunire.

3. That Alibi extends as well to the Courts of the Biſhops, and other Eccleſiaſticall Courts within this Realm, as elſewhere: And ſo the Court ſaid, that it had been often times adjudged, upon which the ſaid Biſhop (the matter of the Indictment being true) confeſſed the ſaid Indictment: And upon this appearing the ſecondary Juſtice gave Judgment againſt him, that the ſaid Biſhop ſhall be out of the protection of the King, and that his Lands, Goods, and Chattels ſhould be forfeited to the King, and his body to be impriſoned Ad voluntatem Regis, &c.

Nicholas Fullers *Caſe.*

Eccleſiaſticall Commiſſion.

In the great caſe of Nicholas Fuller of Grayes Inn, theſe points were reſolved upon conference had with all the Juſtices and Barons of the Exchequer.

1. That no Conſultation can be granted out of the Term, for this, that it is an award of the Court, and is finall, and cannot be granted by all the Judges out of the Term, nor by any of them within the Term out of Court: And the name of the Writ, Viz. A Writ of Conſultation, imports this, that the Court upon conſultation amongſt them ought to award it.

2. That the construction of the Statute, 1 Eliz. cap. 1. and of the Letters Patents of high Commission in Ecclesiastical causes founded upon the said Act, belongs to the Judges of the Common Law: For although that the causes, the cognizance of which belongs to them, are meerly Spirituall, and the Law by which they proceed is meerly Spirituall, yet their authority and power is given to them by Act of Parliament, and Letters Patents, the construction of which belongs to temporall Judges: And for this, the consultation which was granted is with this restraint, Quatenus non agat de authoritate & validitate literarum patentium pro causis Ecclesiasticis vobis vel aliquibus vestrum direct. aut de expositione & interpretatione statuti de anno primo super Reginæ, &c. In the same manner as if the King hath a Benefice donative by Letters Patents, although that the Function and Office of the Incumbent be Spirituall, yet inasmuch as he comes to it meerly by Letters Patents of the King, he shall not be visitable nor deprivable by any Ecclesiasticall authority, but by the Chancellor of the King, or by Commissioners under the great Seal.

3. It was resolved when there is any question concerning what power or jurisdiction belongs to Ecclesiasticall Judges, in any particular case, the determination of this belongs to the Judges of the common Law, in what cases they have cognizance, and in what not; for if the Ecclesiastical Judges shall have the determination of what things they shall have cognizance, and that all that appertains to their Jurisdiction which they shall allow to themselves, they will make no difficulty, Ampliare jurisdictionem suam: And according to this resolution, Bracton lib 5 tract de except. cap. 15. fol. 412. Cum judex ecclesiasticus prohibitionem a Rege suscepit, supersedere debet in omni casu, saltem donec constiterit in Curia Regia ad quam pertinet jurisdictionem; quia si Judex ecclesiasticus æstimare debet an sua esset jurisdictio, in omni casu indifferenter procederet non obstante Regia prohibitione, vide Entries, fol. 445. There was a question, whether Court Christian should have cognizance of a Lamp. And a Prohibition was granted, Quod non procedant in Curia Christianitatis, quousque in Curia nostra discussum fuerit, utrũ cognitio placiti illius ad Curiam nostram vel ad forum ecclesiasticũ pertineat. And if the determination of a thing which appears to Court Christian, doth appertain to the Judges of the common Law, the Judges of the common Law have power to grant a Prohibition. And all this appears in our Books, that the Judges of the common Law shall determine in what cases the Ecclesiasticall Judges have power to punish any Prolatione fidei, 2 H. 4. fol. 10. 21 H. 4. 88. 22 Ed. 4. 20. So of the bounds of Parishes in 5 H. 5. 10. 39 Ed. 3. 23. So it belongs to the Judges of the common Law, to decide who ought to certifie excommunication, and to reject the certificate, when the Ordinary or Commissary is party, 5 Ed. 3. 8. 8 Ed. 3 69. 70. 18 Ed. 3. 58. 12 Ed. 4. 9 H. 7. 1. 10 H. 7. 9. For this it was resolved clearly, that if any person slander the authority or power of the high Commissioners, this is to be punished before the Judges of the common Law, for that the determination of their authority and power which is given to them by the Statute, and the Letters Patents of the King, belongs to them, and not Court Christian: And for this, that the many Articles objected against Fuller concerning the slander of their authority and power, was solely determinable and punishable before the Judges of the common Law. One other restraint was added in the consultation: Et quatenus non agat de aliquibus scandalis, contemptibus seu aliis rebus quæ ad communem legem aut statuta regni nostri Angliæ sunt puniendæ & determinandæ.

4. It was resolved, that if a Councellor at Law, in his argument shall scandall

ſcandall the King or his Goverament, Temporall or Eccleſiaſticall, this is a Miſdemeanez and contempt to the Court, for this he is to be indicted, fined, and impriſoned, and not in Court Chriſtian: But if he publiſh any Hereſie, Schiſm, or erroneous Opinion in Religion, he may be ſu'd in the convented before the Eccleſiaſticall Judges, and there corrected according to the Eccleſiaſticall Law: for the Rule is, Quod non eſt juri conſonum quod quis pro aliis quæ in Curiis noſtris acta ſunt, quorum cognitio ad nos pertinet, trahatur in placitum in Curia Chriſtianitatis, as it appears in the Book of Entries, fol. 448. So that the intent is, that Hereſie, Schiſm, or ſuch enormous opinions in Religion, doth not appertain to the Cognizance of temporall Courts: For this cauſe a Conſultation was granted, Quoad ſciſmata, hereſes, & inormiam impiam vel pernitioſam opinionem in religione, fide ſeu doctrina Chriſtiana pie & ſalubriter ſtabilita infra regnum noſtrum Angliæ, quorum cogoitio ad forum eccleſiaſticum ſpectat, &c. Vide Mich. 13 H. 8. Rot. 78. In Banco Regis. The caſe was, that a Leet was held Jovis poſt feſtum Sancti Mich. Arch. 17 H. 8. of the Prior of the houſe of S. John de Bethlehem de Sheine, of his Manno of Levisham in the County of Surrey, before John Beare the Steward there, a grand Jury was charged to inquire for the King of all Offences inquirable within the ſaid Leet, where one Philip Aldwin, who was a Reſident within the ſaid Leet, appeared at the ſaid Leet. Idemque Philippus ſciens quandam Margaretam uxorem Johannis Aldwin apud Eaſt Greenwich, infra juriſdictionem Letæ prædictæ, pluries perantea corpus ſuum in adulterio vicioſe exercuiſſe, ac volens ipſam Margaretam pro republica in exemplum taliter offendere volentium legitime punire, ad dictam magnam juratam ſe perſonaliter exhibuit & eiſdem ſic juratis de dicta mala & vicioſa vita præfatæ Margaretæ, inſtructionem & informationem veraciter dedit. Upon which the ſaid Margaret did draw the ſaid Philip into the Court of the Archbiſhop of Canterbury, and there did libell againſt him for defamation of Adultery; And that the ſaid Philip ſaid in biſce angliçanis verbis; Margaret Allen is a Whore and a Bawd, and it is not yet three weeks agone ſince a man might take a Prieſt betwixt her leggs; which engliſh words were parcell of the words by which he informed the Grand Inqueſt at the ſaid Leet: And upon this he had by award of the Court a Prohibition, by which Writ it appears, Quod per leges hujus Regni Angliæ omnes & ſingali quicunque Domini Regis ſubditi coram quibuſcunque ipſius Domini Regis Juſticiariis ſeu quocunque alio viro judiciali officio ſeculari fungente, in aliquâ juratam patriæ jurati, vel ad aliquas inſtructiones ſeu informationes alicui hujuſmodi jurat. in evidentias dandas comparentes & evidentias dantes, ab omni impetitione & calumnia in aliqua Curia Chriſtianitatis propterea fienda quieti & liberi eſſe debent & in perpetuũ penitus irreprehen. And by this record it appears, by the Sta. of 10 Ed. 3. c. 11. by which it is provided, that Indictors of Lay-people or Clerks in Turneys, and after delivering them before Juſtices ſhall not be ſued for defamation in Court Chriſtian, but that the Plaintiff who finds himſelf grieved ſhall have a Prohibition framed in the Chancery upon his caſe, which was but an affirmance of the common Law, for the Statute provides only for Indictors in the Turne only: And yet as well all Indictors in other Courts and all Witneſſes, and all others who have affairs in the Temporall Courts, ſhall not be ſued or moleſted in Court Chriſtian, vide Paſch. 6 Eliz. In the Reports of the Lord Dyer (which caſe is not printed) John Halles in the caſe of marriage, between the Earl of Hereford, and the Lady Katherine Gray, declared his opinion againſt the ſentence given by Commiſſioners Delegates of the Queen in a cauſe eccleſiaſticall, under the great Seal: And

And that the ſaid Sentence in diſaffirmance of the ſaid marriage was unjuſt, wicked, and void, and that he thought that the ſaid Judges Delegates had done againſt their conſcience, and could not render any reaſon for the ſaid ſentence: And what offence this was, was referred to divers Judges to conſider, by whom upon great deliberation it was reſolved, that this offence was a contempt as well againſt the Queen, as to the Judges; and every of them were puniſhable by the Common Law, by fine and impriſonment: And that the Queen may upon that ſue for it in what Court ſhe ſhall pleaſe: for the ſlander of a Judge in point of his Judgment, be it true or falſe, is not juſtifiable, &c. And all this appears by the Report of the Lord Dyer, ſo that in the ſaid Conſultation it was well provided, that the high Commiſſioners ſhould not intermeddle with any ſcandall by the common Law.

5. It was reſolved, that when any Libell in Eccleſiaſticall Court contains many Articles, if any of them do not belong to the cognizance of Court Chriſtian, a Prohibition may be generally granted, and upon motion made, conſultation may be made as to things which do belong to the Spirituall Juriſdiction: For the Writ of conſultation with a Quoad, is frequent and uſuall, but a Prohibition with a Quoad, is Rara avis in terra nigroque ſimillima Cygno. And for theſe reaſons it was reſolved by all that the Prohibition in the caſe at the Bar was well granted, which in truth was granted by Fenner and Crook Juſtices in the time of the Vacation.

Note, theſe generall Rules concerning Prohibitions, quæ ſparſim inveniantur in libris noſtris.

Articuli Cleri c. 8. Non debet dici tendere in præjudicium Eccleſiaſticæ libertatis quod pro Rege & Repub. neceſſarium videtur.

Entries 444. 44.7. Non eſt juri conſonum quod quis ſuper ijs quorum cognitio ad nos pertinet in Curia Chriſtianitatis trahetur in placitum.

Circumſpecte agatis, &c. Epiſcopus teneat placitum in Curia Chriſtianitatis de ijs quæ mere ſunt ſpiritualia.

Weſt. 2. cap. 43. Prohibeatur de cætero Hoſpitalarijs & Templarijs ne de cætero trahant aliquem in placitum coram Conſervatoribus privilegiorum de aliqua re cujus cognitio ad forum ſpectat Regium.

Ibidem. Non concedantur citationes priuſquam exprimatur ſuper qua re fieri debet citatio.

The knowledge of all caſes Teſtamentary, Matrimony, &c. by the goodneſſe of the Princes, and by the Lawes and Cuſtoms of the Realm appertain to ſpiritual Juriſdiction.

6. It was reſolved, that this eſpecial conſultation, being onely for Hereſie, Schiſm, and erroneous Opinions, &c. That if they convict Fuller of Hereſie, Schiſm, or erroneous Opinion, &c. that if he recant the ſaid Hereſie, Schiſm, or erroneous Opinion, that he ſhall never be puniſhed by Eccleſiaſticall Law: And after the ſaid conſultation granted, the ſaid Commiſſioners proceeded and convicted Fuller of Schiſm and erroneous Opinions, and impriſoned him and fined him two hundred pounds: And after in the ſame Tearm, Fuller by his Councell moved the Court of Kings Bench to have a Habeas Corpus, & ei conceditur, upon which Writ the Goaler did return the cauſe of his detention.

Mich.

Mich. 5. Jac. Regis.

NOte, Annates, Primitiæ, and first Fruits are all one; It was the value of every Spirituall Living by the year, which the Pope, claiming the disposition of all Ecclesiasticall Livings within Christendom, reserved out of every Living; And those are Impropriations began about the time that Polydore Virgil, lib. 8. cap. 2. saith, Nullum inventum majores Romano Pontifici cumulavit opes quã id quod annuatam vocant, usus qui omnino multo antiquior est quam recentiores scriptores suspicantur, & annates more suo appellant primos fructus unius anni: vide Concilium Viennense quod Clemens. Quintus indixit pro annatibus. First-fruits, Acts and Monuments, 351: & 352.

These First-fruits were given to the Crown by 26 H. 8. cap. 3.

Note, Hill. 34. Ed. 1. An. 1307. At a Parliament held at Carlile great complaint was made of intollerable oppressions of Churches and Monasteries by William Testa (called Mala Testa) and the Legate of the Pope, and principally concerning First-fruits, at which Parliament the King by the assent of his Barons denied the payment of First-fruits of Spirituall Promotions within England, which were founded by his Progenitors and the Nobles, and others of the Realm, for the service of God, Almes, and Hospitality; And to this effect he writ to the Pope, and thereupon the Pope relinquished his demand of First-fruits of Abbeys, in which Parliament the First-fruits for two years were granted to the King.

Decimæ, id est, the Tenths of Spiritualties were perpetual, which in ancient times were paid to the Pope, untill Pope Urban gave them to R. 2. to aid him against Charles King of France, and others who supported Clement the seventh against him. Tenths perpetuall.

And 5 H. 3. by the Buls of the Pope, the Church of England began to pay the Tenths of all their Revenue, as well Spirituall as Temporall to H. 3. for years. These were given to the King by the said act of 26 H. 8. cap. 6. Acts and Monuments, 335, 336. an. Dom. 1266.

Vide Lambert de Priest. Anglorum, &c. fol. 128. cap. 10. omnes qui habuerint 30. denteriat. vivæ pecuniæ in domo sua, de suo proprio, Anglorum lege dabit denarium Sancto Petro, vide ib. inter leges Ivæ, fol.: 78. cap. 4. Peter-pence.

Lambert ib. expositione verbi, Monies and Peter-pence; Ive King of the West Saxons granted it to the Pope when he was in pilgrimage at Rome. Cambd. Brit. pag. 306 saith, that it was Offa the West Saxon King that did grant it: Quære.

Sir Anthony Ropers Case.

IN the case of Sir Anthony Roper, who was drawn before the high Commissioners at the Suit of one Bulbrook the Vicar of Bentley, for a Pension out of a Rectory Impropriate, of which Sir Anthony was seised in fee: And the high Commissioners sentenced the said Sir Anthony to pay that, which he refused; And upon this they committed him to Prison, who in this Term by Habeas corpus appeared in Court, upon the return of which Writ the matter did appear: And it was well debated by the Justices, and was resolved, that the said Commissioners had not authority or commission

commission in the said case, for when the acts of the 27 H.8. & 31 H. 8. of Monasteries had made Parsonages Impropriate, and other Religious Possessions Lay-fee, although that Pensions were saved, yet as it appears by the Preamble of the act of 34 H.8. cap. 16. those to whom the Pensions appertain, had not remedy for the said Pensions, &c. And for this there it is provided, that if the Farmer or Occupier of such Possessions shall wilfully deny the payment of any such Pensions, Portions, Corrodies, Indemnities, Synod Peries, or any other Profits whereof any Arch-bishop, Bishop, Arch-deacon, or any other Ecclesiastical person were in possession at, or within ten years next before the time of such dissolution of any such Monastery, &c. that then it shall be lawfull for the said Arch-bishop, Bishop, or other Ecclesiastical person aforesaid, being so denied to be satisfied and paid therof: And having right to the thing in demand, to have such processe, as well against every such person and persons as so shall deny payment, &c. as against the Church and Churches charged with the same, as heretofore they have lawfully done, and as by, and according to the Lawes of this Realm they may now lawfully do, &c. And if the King hath covenanted to discharge the Patentee, &c. of Pensions, and then suit shall be made for the same in the Court of Augmentations, and not elsewhere; then if the high Commissioners will determine of Pensions, they ought to do it by the act 34 H. 8. and the said act gives this expresly to Ordinaries, and their Officials, and the high Commissioners have their authority by the act 1 Eliz. made a long time after.

But it was objected, that the said act 1 Eliz. gave to the Queen, her Heirs and Successors, power to assign Commissioners to exercise and execute all manner of Jurisdiction Spiritual, to visit, reform, &c. all Schisms and Heresie, &c. and Enormities which by any manner of Spiritual Jurisdiction can, or lawfully may be reformed. And it was said, that such Spiritual Jurisdiction which the Bishop should have, is transferred to the high Commissioners.

But it was unanimously resolved by Coke, Walmsley, Warberton, Daniel and Foster Justices, that the act 1 Eliz. doth not extend to this case for divers causes, viz.

1. For that the said clause of resignation is not more large then the clause of Restitution; and that the act of 1 Eliz. doth not take away nor alter any act of Parliament, unlesse those only which are expresly named in the act; and it was resolved that the high Commissioners cannot hold plea for the double value of Tythes carried away before severance, for two causes.

1. For this, that the Statute 2 Ed. 6. cap. 13. gave the Cognizance of it to Spirituall Judges, which is to be intended of such Spirituall Judges who then were.

2. Subtraction of Tythes is injury and no crime, but concerns interest and property: And for this the high Commissioners cannot meddle with it.

2. For that the words of the act 1 Eliz. are (which by any manner of Spiritual Jurisdiction can or lawfully may be reformed) And it appears that these words extend to crime only, and not to cases of Interest betwixt party and party; for the words are: All such Errors, Heresies, &c. which by any manner, &c. so that (such) and (which) are Relatives.

2. This Jurisdiction was given to the Bishops by act of Parliament, viz. by 34 H 8. which is more temporal then Spiritual: And for this one of the precedent words 1 Eliz. viz. Spiritual or Ecclesiasticall Jurisdiction, which is to be intended of Jurisdictions meerly or purely Spiritual,

ritual, but acts of Parliament are more temporall then ſpirituall.

4. It was not the intent of the act 1 Eliz. which revived the Statute 23 H.8. cap. 9. by which act it is enacted, that none ſhall be ſued out of his Dioceſſe, &c. that the high Commiſſioners for private cauſes ſhall ſend for Subjects out of any part of the Realm, and ſo in effect confound the Juriſdiction of the Ordinary, who is an Officer and Miniſter ſo neceſſary that in divers cauſes the Courts of the King cannot adminiſter to Subjects without him, &c.

5. If the act of 1 Eliz. had extended to give to high Commiſſioners power to determine meum & tuum, as Penſions, Tythes, Legacies, Matrimonies, Divorces, Adminiſtrations, Probates of Teſtaments, &c. the act would alſo give the party grieved benefit of appeal, and not give abſolute authority to the high Commiſſioners finally to determine meum & tuum, and to baſtardize Iſſues, &c. without any controlement, for this ſhould be to diſſolve the Court of the Ordinary which is ſo ancient and inevitably neceſſary in many caſes to the adminiſtration of Juſtice, in divers points of it, that without this Juſtice cannot be executed.

5. The high Commiſſioners cannot extend themſelves but only to Crimes, for the clauſe which gives to them power to impriſon, &c. and to puniſh, &c. and impriſon ſuch Offender, &c. And Offender is only to be intended of him who commits any crime, and not of him who detains Penſion, Legacy, Tythes, &c.

Mich. 5. Jac. Rot. 2154.

Præceptum fuit Guardiano priſonæ Domini Regis de Fleete, Quod haberet hic; viz. apud Weſtmonaſterium immediate poſt receptionem hujus brevis corpus Anthonii Roper militis in priſona prædicta ſub cuſtodia ſua detenti, quocunque nomine cenſeretur, una cum die & cauſa captionis & detentionis ejuſdem Anthonii: Et ijdem Juſticiarii hic viſa cauſa illa, ulterius fieri fecerint quod de jure & ſecundum legem & conſuetudinem regni Domini Regis Angliæ fuerit faciendum: Et modo hic ad hunc diem, ſcilicet diem Sabbati proximum poſt octabis Sancti Mich. iſto eodem termino venit prædictus Anthonius in propria perſona ſua ſub Cuſtodia prædicti Guardiani ad barram, hic prædict. & idem Guardianus, tunc hic mand. Quod ante adventum brevis prædicti, viz. novo die octabis ultimo præterito Prædictus Anthonius Roper miles reducit ſe priſonæ prædictæ perantea commiſſus virtute cujuſdem warranti dati 30. die Junii ultimo præterito, quod ſequitur in hæc verbæ, viz.

Hab. Corpus retorn, and diſcharge by judgment of the Court.

THeſe are in his Majeſties name to require and charge you, by vertue of his high Commiſſion for cauſes Eccleſiaſticall, under the great Seal of England, to us and others directed, that herewith you receive and take into your Cuſtody the body of Sir Anthony Roper Knight, and him ſafely detain Priſoner at this our commandment, untill we ſhall give order for his enlargement, ſignifying unto you, that the cauſe of his commitment is, for that there being a certain cauſe referred unto us by his Majeſties ſpecial direction, betwixt him the ſaid Sir Anthony Roper and John Bulbrook Vicar of Bentley, for that he detained wrongfully from him the ſaid Vicar, a certain yearly Penſion due unto him from the ſaid Sir Anthony; And being thereupon called before us, and after full hearing of the

the cause in the presence of Sir Anthony and his Councel at three or four severall times, and at the last adjudged by us to pay the said Pension, he having sometime of deliberation given unto him by us to consider therof, hath notwithstanding obstinately disobeyed the said Order, and doth so still persist: And this shall be your Warrant in that behalf; Given at Lambeth this thirtieth of June, 1607. Et quod hæc fuit Causa Captionis & detentionis, prædicti Anthonii in prisona prædicta, corpus tamen prædicti Anthonii modo hic paratus habet prout per breve prædictum sibi præceptum fuit, &c. super quo, visis præmissis & per Justiciarios hic plenius examinatis & intellectis, videtur ijsdem Iustic. hic quod prædicta Causa commissionis prædicti Anthonii prisonæ de Fleete prædict. in retorno prædict: superius specificata minus sufficiens in lege existit ad detinendum prædictum Anthonium in prisona prædict. Ideo prædictus Anthonius a prisona prædicta per Curiam hic demittitur, ac idem Guardianus de hujusmodi Custodia per eandem Curiam hic plene exoneretur, &c. And this was resolved una voce by Coke chief Justice, Walmsley, Warberton, Daniell, and Foster Justices, for the causes and reasons afore expressed.

And in the very same Term in Lanes case, a Parson in Norfolk who sued one of his Parishioners before the high Commissioners, for scandaling of him, saying in the Church on the Sabbath before all his Parishioners, That he was a wicked man, and an arrant Knave: Prohibition lyes, for this, that it was not so enormous as the Statute intended. Note, that by expresse Proviso, the high Commissioners cannot intermeddle with all Heresies, but with exorbitant Heresies, &c. and the other shall be determined before the Ordinary.

Hill. 5. Jac.

Justice of *Wales* cannot be by Commissi n but by Patent.

NOte, it was moved to the Justices this very Term, upon consideration of the acts of 34 H. 8. cap. 28. and the 18 Eliz. If the Justices in Wales may be constituted by Commission; and upon conference it was conceived they could not, but that it ought to be by Patent, as it hath been used ever since the act 34 H. 8. Then it was moved, if the King which now is, may by force of a clause of 34 H. 8. do it, which clause is, That the Kings most Royall Majesty shall and may at all times hereafter from time to time, change, add, order, alter, minish, and reform all manner of things before rehearsed, as to his most excellent wisdom and discretion shal seem meet: And also to make Lawes and Ordinances for the Commonwealth, and good quiet of his said Dominion of Wales, and his Subjects of the same, from time to time, at his Majesties pleasure. And it seemed to divers of the Justices, that this power given to the King determined by his death, for divers causes,

1. It wants these words, His Successors, and for this it ought to be drawn in succession by construction, and that should be against the intention of the makers of the act, for they gave this high power of alteration, &c. of the Lawes to the Kings most excellent Majesty, as to his most excellent wisdom and discretion shall be thought most meet; which words want, His Successors: For as his wisdom and discretion, which they well knew, did not go in succession, so the power and great confidence which was annexed to them did not go in succession; and for this, that Eorum progressus ostendunt multa quæ ab initio provideri non possunt: And what ensues upon this Act of the 34 H. 8. concerning this uniting of

Wales

Wales and England, and the ſubjection of them to the Lawes of England, none could divine: For this cauſe it was thought reaſonable that King H. 8. during his time, might alter them; that he ſeeing the obedience of thoſe of Wales, and the good fruit which proceeds out of the ſaid act, never altered any part of it: But it was never the intention of the ſaid act to give power to the King and his Succeſſors for ever, to alter, &c. the Laws, ſo that none of that Country could be certain of his life, lands, goods, or liberty, or any thing which he hath, and that would be a great ſervitude; Miſera ſervitus eſt ubi jus eſt vagum: Alſo the words are for the Common-wealth, &c. if his Majeſties Subjects of Wales, at his Majeſties pleaſure, by which it appears that the intention of the makers of the act, was to give this power to King H. 8. for his pleaſure, did determine by his death.

2. Power of alteration of Lawes, &c. is a point of high confidence concerning the adminiſtration of Juſtice, which the act by omitting of his Succeſſors, intended to unite this confidence to the perſon of H.8. and not to extend it without limitation of time to his Succeſſors: And this ſtands with the conſtruction of Law in other caſes, for all Commiſſions concerning the adminiſtration of Juſtice, determine by the death of the King, yet he conſtitutes them Juſticiarios ſuos, which authority being in caſe of Adminiſtration of Juſtice determines by the death of the King, or reſignation, 1 Ed. 5. 1. 1 H. 7. 1. 14 Ed. 4. 44. yet if the King make a Leaſe Durante bene placito, or preſent one to a Church, theſe are not void by his death, untill they are controlled or revoked by his Succeſſor: But the Office of a Sheriff which is granted, Durante bene placito, determines by the death of the King, for this concerns the adminiſtration of Juſtice: And upon certificate of the opinion of the Juſtices, that the Juſtices of Wales cannot be conſtituted by commiſſion to the Lord Chancellor, Baron Snigg had a Patent for the Circuit of Wales, as others had before.

Trin. 6. Jac.

High Commiſſion. Purſivant.

THis Term it was reſolved Per totam Curiam in Communi banco, viz. Coke chief Juſtice, Walmſley, Warberton, Daniel, & Foſter, in the caſe of Allan Ball, that the high Commiſſioners cannot by force of the act 1 Eli. cap. 1. ſend a Purſivant to arreſt any perſon ſubject to their Juriſdiction, to anſwer to any matter before them: But they ought to proceed according to Eccleſiaſticall Law, by citation: For the Statute 1 Eliz: did not give them any ſuch authority to arreſt the body of any Subject upon ſurmiſe: & although that it be comprized within their Commiſſion. that they may ſend for any by Purſivant, &c. yet inaſmuch as this hath no foundation upon the act 1 Eliz. the King by his Commiſſion cannot alter the Eccleſiaſticall Law, nor the proceedings of it, for the act ſayes, That the Commiſſioners ſhall exerciſe, uſe, and execute all the Premiſſes (according to the privilege of the act) according to the ſaid Letters Patents, Id eſt, the Letters Patents which are mentioned and authority before, for this is implyed within this word (ſaid) and for this without queſtion, the commiſſion only without the act cannot alter the proceedings of the Eccleſiaſticall Law: And in the Circuit of Northampton, when the Lord Anderſon and Glanvile were Juſtices of Aſſiſe, a Purſivant was ſent by the Commiſſioners to arreſt the body of a man to appear before them, and

in reſiſtance of the arreſt, and ſtriving amongſt them, the Purſivant was killed: And if this was Murther or not was doubted, and this depended upon the validity of power and authority of the Purſivant, for if his authority was lawfull, then in killing of an Officer of Juſtice in execution of his Office, is murther: And advisement was taken till the next Aſſises; and upon conference at the next Aſſises it was reſolved, that the arreſt was Tortius, and by conſequence that this was not murther: But they may ſend Citation by a Purſivant, and proceed, if the party make default, to excommunication, and then to have a Capias excommunicatam, and to impriſon him by the Writ of the King, which Writ De excommunicato capiendo, is preſerved and retornable by the Statute of 5 Eliz. which ſhall be in vain, if they may arreſt him by a Purſivant before any anſwer or default made: And this will be againſt the Statute of Magna Charta, and all the ancient Statutes, which ſee Raſtall, Title Accuſation: If a free-man ſhall be arreſted upon a bare ſurmiſe or accuſation: which Statutes if good and preſitable for the Weal-publike, never were intended to be repealed by the ſaid Statute of 1 Eliz.

Note, that neither the Star-chamber nor Chancery awards any Meſſenger to arreſt the body untill a contempt made, but firſt a Subpœna, &c.

Marmaduke Langdales Caſe.

High Commiſſion.

In the caſe of Marmaduke Langdale of Leaventhorpe in the County of York, by Iohan. his Wife, being ſued for maintenance before the Biſhop of Canterbury, and other high Commiſſioners: It was reſolved Per totam Curiam, præter Walmſley who doubted of it, that a Prohibition, which before was granted, was well maintainable, for this, that it was not any enormity, nor any offence within the Statute, but a neglect of his duty, and a breach of his vow of maintenance; alſo the party ſhal be defeated of his appeal; And for that reaſon it belongs to the Court of the Ordinary: And the rule of the Court was that the Plaintiff ſhall count againſt the high Commiſſioners (for againſt his Wife being one perſon in Law with him, he could not count) and upon demurrer joyned, the caſe to be argued and adjudged, upon which the party grieved may have a Writ of Error, Si ſibi viderit expedire, &c.

On Sunday laſt, my Lord chief Juſtice and my ſelf, at Serjeants Inn in the after-noon, received by the hands of the Kings Attorney by commandment, as he ſignified to us by your Lordſhips, the ſaid complaints exhibited to his Majeſty by the Lord Preſident of Wales, and the Lord Preſident of York, againſt the Judges of the Realm, with a ſignification of your Lordſhips pleaſure, that we two ſhould impart the ſame to the reſt of our Brethren, which we did on munday in the after-noon, the fore-noon being ſpent in the publike ſervice of the Realm, at Weſtminſter: And upon conſideration had of parts of the complaint, we have, as this ſhort time will give us leave, being daily imployed, as well in the Courts at Weſtminſter, as ſome of us for tryals of Writs of Niſi prius, reſolved upon theſe anſwers, which we knowing to be warranted by the Lawes of this Realm, doubt not but will be allowed by your Lordſhips; And do hope that where the Judges of this Realm have been more often called before your Lordſhips, then in former times, they have been,

been, which is much obſerved, and gives much emboldning to the Vulgar, that after this day we ſhall not be ſo often (upon ſuch complaints, your Lordſhips being truly informed of our proceedings) hereafter called before you.

And ſeeing that my Lord Preſident of York hath now Ore tenus, firſt opened the cauſe of his grief more amply, and in ſome caſes more particularly, I will begin to thoſe objections that have been made on the behalf of that Councill, wherin for method, and for avoiding of confuſion, I will firſt ſpeak to the true cauſe of the Inſtitution of that Court.

2. That our proceedings in granting of Prohibitions, is for the matter juſtifiable by Law.

3. That the manner of our proceedings was reſpectfull and comly towards the Lord Preſident of York, and the Council there.

4. Anſwers to all objections both particular and generall.

5. Remedies for the time paſt, if there be juſt cauſe.

6. And laſtly, remedies for the future, to take away all the cauſes of oppoſition between the Judges and both the ſaid Councils: Viz.

After the ſuppreſſion of all Religious houſes to the value of two hundred pound, or under, An. 17 H. 8. in the beginning of October, An. 28 H. 8. there was a great inſurrection of the Lord Huſſey, and twenty thouſand perſons in Lincolnſhire, about the cauſe of religion, againſt whom the Duke of Suffolk went, and appeaſed them.

As ſoon as they were appeaſed, great Commotion began in Yorkſhire, of 40000. men, Sir Robert Ask being Chief, ſoon after in Lancaſhire began a great Rebellion of men of that County, and of Cumberland, Weſtmerland, and Northumberland, againſt whom the Earl of Derby was imployed, and quieted them: After that Muſgrave, Tilby, and others began to raiſe a great number, and aſſaulted Carlile Caſtle, whom the Duke of Norfolk overthrew.

Preſently after Sir Francis Pigot with a multitude of people, made an Inſurrection at Setrington, Leigh, Pickering, and Scarbrough in Yorkſhire, whom the Duke of Norfolk pacified: And ſoon after the Lord Darcy, Ask, Conſtable, Bulmer, &c. began a new Commotion about Hull in Yorkſhire, whom the Duke of Norfolk appeaſed. And all theſe Rebellions were between the beginnings of 28. and 30. of H. 8. within which time many of the Rebels were executed in Furore belli, and in Flagranti crimine, by Marſhall Law, and ſome attainted by the Common Law, the King intending the ſuppreſſion of the greater houſes of Religion, which An. 31. H. 8. he effected; he eſtabliſhed a Councell there for the quiet of the Countries of Yorkſhire, Northumberland, Weſtmerland, Cumberland, Duriſme, the Counties of the City of York, Kingſton upon Hull, and Newcaſtle upon Tine, for preventions of Riots, Tumults, and Inſurrections in thoſe Counties and places: In this time of neceſſity and danger, the King did arme the Preſident and Councel with two authorities in one Commiſſion: the one a Commiſſion of Oyer and Terminer, de quibuſcunq; congregationibus & conventiculis illicitis coadjutoribus Lolardis, impriſionibus falſis, allegatis, trangreſſionibus, Riotis, Routis, retentionibus, contemptibus, falſitatibus, maintenentiis, oppreſſionibus violentis, extortionibus & aliis malefactis, offenſis, & injurijs quibuſcunque per quæ pax & tranquilitas ſubditorum noſtrorum Comitatibus, Civitatibus, & villis prædictis gravat. &c. Secundum legem & conſuetudinem regni noſtri Angliæ vel aliter ſecundum ſanas diſcretiones veſtras audiendum & terminandum.

The other authority was, Nec non quaſcunque actiones reales, ſeu de libero tenemento, & perſonales, cauſaſque debitorum & demandorum quorumcunq;

rumcunq; in Com. &c. prædictis, quando ambæ partes vel altera pars ſic gravata paupertate fuerit quod commode Jus ſuũ ſecundũ legẽ Regni noſtri aliter proſequi non poſſit, ſimiliter ſecundũ leges & conſuetudines regni noſtri Angliæ vel aliter ſecundum ſanas diſcretiones veſtras. And this is all the authority that the Preſident and Councell had firſt expreſſed in their Patents, without any private inſtructions: And this appears by the Commiſſion under the great Seal, 31 H. 8 6 pars. Roberto Landavenſi Epiſcopo Preſidenti Concilij & alijs, out of which Charter theſe things were obſerved, Viz.

1. That the finall intention of the Commiſſion was, Quod pax & tranquilitas ſubditorum preſerventur.

2. That they hear and determine Riots, Routs, &c. according to Law, or their diſcretions, which authority by diſcretion was added, Ad faciendum populum; For it was reſolved without queſtion, that in ſuch caſes they had not power but to proceed according to Law, for that is, Summa diſcretio, and not according to their private conceits and affections, quia talis diſcretio diſcretionem confundit, ſo the other clauſe concerning reall and perſonall Actions in all the Counties of York, Northumberland, Cumberland, Weſtmerland, Duriſme, and the Towns aforeſaid was only Ad faciendum populum, for this was utterly void in Law. For,

1. No ſuch generall authority granted, may be made by the Commiſſion of the King, to hear and determine all reall actions within ſuch a County according to Law, as he may by Charter within a certain County or particular place, for the King by Commiſſion may give power to determine criminall cauſes between the King and the party, Secundum legem & conſuetudinem Angliæ, but he cannot give power by Commiſſion to determine cauſes between party and party: As it was reſolved in Scroggs caſe, An. 2 Eliz. fol. 175. in Dyer, vide Dyer 236. But the King by his Letters Patents may grant to ſuch a Corporation in ſuch a Town, Tenere placita realia, perſonalia, & mixta; And none by this can have any prejudice, for the proceeding ought to be according to Law, and if they erre, the party grieved may have his Writ of Error, but the Court cannot grant to them a Court of Equity for the cauſe aforeſaid; And for this cauſe, that ſuch a Judge ſhould be without controlement: And it was ſaid, that if ſuch Commiſſioners cannot determine Felonies, or other criminall cauſes by Writ, but by Commiſſion, ſo cannot any determine private cauſes betwixt party and party by commiſſion but by Writ, by the Statute of Magna Charta, cap. 12. & Weſt. 2. cap. 30, Recognitiones de nova diſſeiſina &c. non capiantur niſi in proprijs Comitatibus: Which acts give authority to Juſtices of Aſſiſe in their proper Counties, by which it appears, that without an act of Parliament, the King by his Letters Patents cannot put and authoriſe Juſtices De Aſſiſes Capiendas, to take them within another County: And for this the ancient Preſidents and proceedings of Law ought not to be altered. As a Juſtice of one Bench, or of the other, ought to be made by Commiſſion, and not by Writ, and yet he may be diſcharged by Writ 5 Ed. 4. 32. But Juſtices in Eyre are by Writ, as it appears by Bracton, lib. 3. cap. 11. and Britton, fol. 1. Alſo by the Statute of Weſt. 2. cap. 30. and of York, cap. 4. Juſtices of Niſi prius, give Judgment in Aſſiſes of Darrein preſentment, and Quare impedit in ſuch a County, which cannot be done without Parliament, Et ſic de ceteris.

Alſo it was obſerved, that at the firſt the ſaid Commiſſion concerning actions between party and party, extended only when both the parties, or one of them were ſo poor, as they were not able to proſecute at Law: Alſo by the firſt Inſtitution they had no power to grant Injunctions. And laſtly,

ly their Commiſſion was Patent under the great Seal, and enrolled in Chancery: And thus much was ſaid for the firſt, concerning the true cauſe of the Inſtitution of the Court, Viz. For preventing of Tumults and Rebellions, and when it began.

2. As to the ſecond point, the granting of Writs of Habeas Corpus, and Prohibitions is juſtifiable by Law; for whereas at the firſt their authority was Patent, it is now private, for the Letters Patents do refer unto certain Inſtructions which are no where of Record, but kept in private, and it was feared for private reſpects, Et de non apparentibus & non exiſtentibus eadem eſt ratio: beſides, the danger to the Subject is great, for if they loſe their Inſtructions (as it hath hapned heretofore) all is Coram non judice: And this firſt reaſon is drawn from the Inſtructions themſelves: The ſecond reaſon is drawn from the contumacy of the party, that ſuppoſeth himſelf to be grieved by the Prohibition, and againſt whom it is granted, if the authority of the Councell be never ſo good, yet being late and particular Juriſdiction, the party muſt of neceſſity plead it, ſo as it may appear unto us judicially, for as we are Judges of Record, ſo muſt we be informed of Record, and never yet hath any party prohibited moved in Court to have a conſultation, by which might be ſet forth the Juriſdiction of that Court and Councell, ſo as the granting of Prohibitions hath been juſt; and the fault (if any be) in the parties themſelves, that never hitherto made their cauſe known, as it ought to be by Law, to the Court.

The third reaſon is drawn from the great injury offered to the Defendants, for it is a true Rule, Miſera ſervitus ubi jus eſt vagum aut incertum: The Defendants by Law, may in all Courts plead to the Juriſdiction of the Court; but how can they do ſo when no man can poſſibly know what Juriſdiction they have concerning matters of State, which are Arcana imperij, it is meet they ſhould be kept Sub ſigillo conſilij, and in ſecret: but for Juriſdiction between party and party, for deciding of Meum & tuum, God forbid they ſhould not be known to them who are to be judged by them; but the keeping of them in ſuch ſecrecy betraieth, that the Councell are afraid that they would not be juſtified if they were known: And it was concluded again, Miſera ſervitus ubi jus aut vagũ aut incertum.

3. But proceedings herein have been reſpectfull, for a Jury of Officers and Attorneys of our Court, being according to an ancient cuſtom time out of mind of man uſed, ſworn to preſent amongſt other things and Articles, all defaults of Officers and Miniſters in not executing the Writs and Proceſs out of this Court, and all impediments & hinderances whatſoever of the due proceedings of this Court, whereby Juſtice cannot be adminiſtred: And finding upon their Oaths divers unjuſt & undue impediments of the proceedings of this Court, by the ſaid Councell in particular: And thereupon a motion being made in open Court in Michaelmas Term laſt, by the Kings Serjeant Philipps, of many intollerable grievances of the Subject, offered by the ſaid Councell, to many of his Majeſties Subjects in derogation of the Kings Lawes, in prejudice of the Kings profits, and in hinderance of the due proceedings of this Court, prayed the Court according to Law and Juſtice, to grant ſeverall Prohibitions in all thoſe ſeverall cauſes, which we could not deny, but yet thought fit before we granted the ſame, that their might be a good correſpondence between both Courts, we ſhould firſt conſer with Sir Cuthbert Pepper Attorney of the Wards, and one of that Councell, to let him underſtand the particular grievances and oppreſſions, and to hear what he could ſay in the juſtification therof, who accordingly upon motion came to us to Serjeants Inn, with

whom we conferred, and ſignified to him the particulars of the ſaid grievances, who would not take upon him to juſtifie the ſame in no ſort, but ſaid, he would acquaint the Preſident and Councell therwith, and return their anſwer, which for that it was neglected, we upon further motion in Court granted Prohibitions, as in Juſtice we ought, which courſe and order of proceedings we hold to be reſpectfull and comly toward the Lord Preſident and Councell.

4. It was objected, that more Prohibitions had been granted of late, then in many years before, whereunto a fivefold anſwer was made.

1. That they had exceedingly multiplied the number of cauſes, ſo as they have above two thouſand depending at one time, and having but five Counties and three Towns, at one ſitting there were about 450. cauſes at hearing, whereas the Chancery that extends into 41. Counties Engliſh, and 12. in Wales, in all 53. had in Eaſter Tearm, but 95. to be heard, and in Trin. Term. but 72. ſo as if they multiply their cauſes ſo infinitely above what were at the firſt, it is no wonder if the number of Prohibitions be increaſed.

2. Beſides the multiplication they have innovated and taken upon them to deal in cauſes which we know never any Preſident could, and we think never any Preſident and Councell did uſurp: As firſt, Suits upon penall Lawes, and many of them limited to the Courts at Weſtminſter, but all of them without queſtion out of their Juriſdiction: As for example, between Harriſon and Thurſtone in Engliſh Bill, upon the Statute 39 Eliz. of Tillage, whereas the very Statute giveth Juriſdiction to certain ſpeciall Courts: The Defendants pleaded to the Juriſdiction, whereupon an Attachment was awarded againſt him, and fined.

2. In the caſe of Hartley after Indictment of forcible entry and reſtitution, according to the Statute upon an Engliſh Bill diſpoſſeſſed by the Preſident.

3. And after a recovery in an Ejectione firmæ, and execution by Habere facias poſſeſſionem out of our Court, they upon an Engliſh Bil, diſpoſſeſſed the Plaintiff, and this was Harts caſe. Between Jackſon and Philipps, after Judgment in our Court, ſuit there by Engliſh Bill. Between Stanton and Child, after execution in debt by proceſſe out of our Court they commit the Plaintiff, an old man and lame. Between Binns and Collet, after the Defendant was outlawed in an action of Battery.

4. They admit Engliſh Bills in the nature of Writs of Error, and of Formedons and other reall actions.

5. They will admit no plea of Outlawry in diſability of the Plaintiff.

6. They uſually granted Injunctions to ſtay the common Law, which is utterly againſt Law, and ſomtimes to ſtay ſuits in Chancery, and in the Exchequer Chamber, and many other proceedings which are againſt Law and reaſon, to the great oppreſſion and grievance of the Subject, ſo in reſpect as well of the multiplication of Suits as Innovations of others, It may very well be that more Prohibitions and Habeas Corpus have been granted of late then were in times paſt; And yet there hath been more granted, and more ancient then is ſuppoſed: For Mich. 7. Eliz. Rot. 31. upon a motion made by Carus, the Kings Serjeant, Habeas Corpus was granted out of the Kings Bench, for the body of John Lamburn, alias Lambert, which Writ being returned, that he went to the Caſtle of York, where John Lambert was a Priſoner, and that one Oſwald Wilkinſon, the Gaoler refuſed to deliver him without the leave of the Arch-biſhop of York, Preſident of the Councell there, wherupon he went to the Arch-biſhop,

Arch-bishop, and shewed unto him the Queens Writ of Habeas Corpus, whereunto the Arch-bishop answered, that John Lambert was not the Sheriffs Prisoner, but was committed by him and the Councel to the Goalers custody, and therefore he should not be delivered, and therefore he sent one Morgan his Secretary to the Goaler, that he should not be delivered; And thereupon as well for the contempt in the Arch-bishop, and the Goaler as for the insufficient return in not having the body, Carus the Kings Serjeant moved for an Attachment against the Arch-bishop of York, and Wilkinson the Goaler, for the contempt returned by the Sheriff, and it was granted, and the Sheriff was amerced, for that he shewed no lawfull cause, Mich. 7. & 8. Eliz. in libro de Habeas Corpus. John Dawson in Prison for a Riot by English Bill, before the President and Councell of York, removed by Habeas Corpus and delivered, for no man ought to be convicted for a Riot, but by Indictment, tryall, or other due processe at Law: and there are many other like Writs of latter time, Hasch. 12. Eliz. in libro de Habeas Corpus, Thomas ap Morgan, committed by the Councell and President of Wales, &c. and finding the cause unjust, bailed him, &c. And in Trin. 20. Eliz. ib. the like Writ for the body of John Rowland, committed by the President and Councell of Wales, and finding by the return that the commitment of him was against Law, he was discharged by the Court, and many more of that nature.

3. The Judges never grant either Prohibitions or Habeas Corpus, but upon motion or complaint by the party grieved, so as if the parties have greater cause of complaint then they had in times past, there must of necessity be more Writs of Prohibition, and Habeas Corpus granted then was heretofore.

4. The proceedings before the President and Councell, are by absolute power, their decrees uncontrollable and finall, and more finall then a Judgment in a Writ of Right, for thereupon a Writ of Error lyeth, but these sentences are unreversible, which makes them adventure and presume too much upon their authority, and tends to the great oppression and grievance of the Subject.

5. These Suits there grow to be more prejudiciall to the King then ever they have been, for by the multiplication and innovation of Suits, as well reall as personall, the King loseth his Fines, &c.

5. Remedy for the time past, if we have erred in Judgment, a Writ of Error lieth in the Kings Bench, if the Kings Bench doth erre, a Writ of Error lieth in the Upper house of Parliament, where the King and the Lords be only Judges.

6. For the time to come, first, that the Instructions be enrolled in the Chancery, whereunto the Subject may have accesse, and know their Incidiction. 2. That the Presidents and Councels have some Councell learned in the Court, who may inform us judicially of their true Incidiction, and we will give a day to them before we grant any Writ, to shew cause to the contrary, so as Justice upon hearing of both sides shall be done; and if we err, the Law hath provided a remedy by a Writ of Error, and no other course can be taken: And we are sworn both to maintain the Kings Prerogative and to do Justice to all men, according to the Lawes and Customs of England: So as command, my Lords, whatsoever it shall please you, that lyeth in our power, and which by our Oath we may perform, and we will most willingly obey it: And that which a great Divine said to God Almighty, we say unto your Lordships who sit in Gods Seat, Da Domine quod jubes, & jube quod vis, &c.

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The particular caſes ſet down in the Petition are anſwered in the ſecond part of our proceedings juſtifiable untill they plead their Juriſdiction, and make it appear to the Court to be lawfull. Concerning the Jury of Attorneys, it hath been anſwered before: And for the motion to have a Rule ſet down, &c. It was moved by the Kings Serjeant, and we adviſed thereupon: when this had been thus delibered, by way of anſwer, Bacon the Kings Sollicitor offerred to reply, but after the Judge had ſpoken in the name of all his Brethren, the Lords would not ſuffer him to ſpeak after the Judge; But all others being deſired to retire into the next Chamber, the Lords had long and prudent conference amongſt themſelves, and after we were called in again, and then the Earl of Salisbury, Lord Treaſurer, by the conſent of that Honourable Table, gave this Reſolution.

1. That the Inſtructions ſhould be recorded for ſo much as concern'd either criminall Cauſes, or Cauſes between party and party; As for matters of State, if any be, the ſame not to be publiſhed.

2. That it was neceſſary, that both Councils ſhould be within the Survey of Weſtminſter Hall, Viz. The Courts of Weſtminſter.

3. The motion was well allowed, that the Preſidents and Councils ſhould have Councell learned in every Court: And that upon motion made in open Court, upon any Prohibition, to either of them, day ſhould be given to ſhew Cauſe, &c.

4. The Lord Treaſurer repeated the ſentence, and ſaid, that true it is, *Ubi Lex aut vaga aut incerta miſerrima eſt ſervitus*, where mens Eſtates and fortunes ſhall be decided by diſcretion.

And concerning the remoteneſſe of the place, what reaſon ſhould there be at this time more for thoſe parts, then for the Counties of Cornwal and Devon, which are more remote then York? And this was an end of this daies work.

Hereſie, Upon conference with Sir *John Popham* and others, An. 43. Eliz.

NOte, 2 Mar. title Hereſie, Brook per omnes Juſticiarios & Baker & Hare: The Arch-biſhop in his Province, in the Convocation, may and doth uſe to convict Hereſie by the common Law, and then to put them convicted into Ley hands, and then by the Writ, De hæretico comburendo they were burnt: But for this, that it was troubleſome to call a Convocation of the whole Province, it was ordained by the Statute of 2 H. 4. cap. 15. That every Biſhop in his Dioceſſe might convict Hereticks; And if the Sheriff was preſent, he might deliver the party convict to be burnt, without any Writ De hæretico comburendo: But if the Sheriff be abſent, or if he be to be burnt in another County, then there ought to be a Writ De hæretico comburendo; And that the Common Law was ſuch, vide lib. intra. title Indictment, pl. 11. who there are taken for Hereticks, ſome of them are conſonant to true Religion, vide 11 H. 7. Book of Entries, fol. 319. ſee Dr. & St lib. 2. cap. 29. Coſin. 48. 2. ſee the Statute of 1 & 2. P. M. cap 6. That Ordinaries wanting authority to proceed againſt Hereticks, 3. F. N. B. fol. 269. And the Writ in the Regiſter, which in the new Writ is omitted proves this directly, 4. Bracton, lib. 3. cap. 9. fol. 123, 124. Concilio Oxonienſi quidam Diaconus convictus fuit de Apoſtaſia, ſed primo degradatus fuit per Ordinarium: And true it is, that every Ordinary may convent

convent any Heretick or Schiſmatick before him, Pro ſalute animæ, and may degrade him, as Bracton ſaith, and may injoyn him penance according to the cenſure of Eccleſiaſticall Law: But upon ſuch conviction by the Common Law, the party convict ſhall not be burnt, nor any Writ De hæretico comburendo lyeth upon it; for the Common Law will not commit Diſcuſſion of a Hereſie, for the life of a Chriſtian man, to any ſole Judge.

Nota, The makers of the act of 1 Eliz. were in doubt what ſhall be deemed Hereſie, Schiſm, or Schiſmaticall Opinion: And for this on purpurſe the Statute 10 Eliz. provides that nothing ſhall be deemed Hereſie by any of the Commiſſioners, by vertue of the high Commiſſion, but what had been determined for Hereſie by one of the four generall Councils, or expreſſly by the word of God, or Parliament, and will not leave it to ſo many of the Biſhops and high Divines who are Commiſſioners, to determine what was Hereſie: without queſtion it cannot be thought reaſonable that this ſhall be left without any limitation to one only Biſhop, but to a generall Convocation; for Plus vident oculi quam oculus, ſee Fox in Ed. 6. Tyne the Ordinary convicted none but by commiſſion, and it appears by Bracton, vide ſupra, & Britton, who writ in 5 Ed. 1. lib. 1. cap. 17. That an Heretick ſhall be burnt for Hereſie, but he doth not ſpeak of the manner of conviction: See Horne in Myrrour of Juſtice; And true it is, that it appears by the preamble of the Statute, 2 H. 4. that the Ordinary hath Cognizance of Hereſie: And this is true, as it hath been ſaid, Pro ſalute animæ; but not to burn the Heretick before that Statute: And with this agrees the Statute, 2 H. 5. cap. 7. 23 H. 7. 9. 25 H. 8. cap. 14. which recites the miſchief, and the ſaid act 2 H. 4. introduceth, ſcil. That a man incurs the loſſe of his life, good fame, or goods, upon naked ſuſpition without due examination and teſtimony, or preſentment, viz. Confeſſion, &c. Alſo that the words in the ſaid Act, viz. Cannonical Functions, were too generall and incertain; Alſo that it was not defined by the ſaid act what was Hereſie, the ſaid Act repeals the act, 2 H. 4. & 2 H. 5. and the ſame act 25 H. 8. gives power to the Ordinary to proceed in other form and manner then the Statute 2 H. 4. hath provided, viz. That the Ordinary ſhall only proceed upon preſentment or indictment of Hereſies, or upon an accuſation of two lawfull witneſſes, and not otherwiſe. Alſo the Ordinary cannot burn the Heretick without the Kings Writ De hæretico comburendo, ſo that the proceeding in that Commencement and end was altered by the Statute 25 H. 8. and where this Statute ſayes, Ordinaries having power to examine Hereſies, this reſtrains it to Ordinaries themſelves and not to Suffragans, Commiſſaries, &c. Then came the Statute of 1 Ed. 6. cap. 12. and that repealed, 5 R. 2. 2 H. 5. & 25 H. 8. but not the 2 H. 4. by expreſſe words, but by generall words, viz. All Statutes concerning matter of Religion: then came the Statute 1, & 2. P & M. cap. 6. and revived the Statute 2 H. 4. amongſt others, by the revivez of which, without more, the Statute of 25 H. 8. loſeth its force, ſo that the Ordinary may proceed upon bare ſuſpition, and burn in any caſe without the Kings Writ: But by the act 1, & 2. P. & M. cap. 8. after divers acts expreſſly repealed, Scil. 21 H. 8. 23 H. 8. 24 H. 8. 27 H. 8. but the act of the 25 H. 8. cap. 14. was not expreſſly repealed, for this was repealed before by the act 1 Ed. 6. and yet in the end of that long and prolix Act, there is a generall clauſe which is ſufficient of it ſelf to repeal the Act of 25 H. 8. cap. 14. without more, Scil. the Eccleſiaſticall Juriſdiction of the Arch-biſhop and Ordinary to be in the ſame Eſtate, for proceſſe of Suits, puniſhment of crimes, and execution of Church cenſures, with knowledge of Cauſes belonging to the ſame; and as large in theſe points as the ſaid Juriſdiction

was the twentieth year of the Raign of H.8. by which Clause without question the Act of the 25. of H.8.cap.14. was repealed; then came the Statute of 1 Eliz.cap. 1. and by this the said Act of the 1, & 2. Phil.& Mar. is repealed, except such branches as after in the Act is excepted: And after divers acts particularly are repealed by the Act 1, & 2. P. & M. and are revived by 1 Eliz: particularly: And after in the same act of 1 Eliz. it is enacted, that all other Statutes repealed by the said act of Repeal of 1, & 2.P.& M. and not in this act specially revived shall remain repealed: But the act 25 H.8.cap. 14. was not particularly revived, and therefore is repealed; and after it is enacted by the Statute of 1 Eliz. that the said act 1, & 2. P. & M. of reviving of three Acts for punishment of Heresies, and the said three Acts themselves shall be repealed, so that now at the Common Law none can be burnt for Heresie, but by conviction at a Convocation, for the Statute of 2 H. 4. cap.15. and 25 H.8. 14. are now repealed, and no regard was had to the said Doctor Cosins, in his Apology pag.48. That he heard the two chief Justices,&c. for he doth not vouch any time, or persons,&c. And it may very well be that they said, That cognizance of Heresie belongs to Ordinaries Quatenus to penance, but not Quatenus to losse of life.

Note also, that by the said Writ in the Register, it appears that Hereticks convict ought first to abjure, so that it may be said Omnes infra ovile, and after relapsed into the same Heresie, there he shall suffer death: And with this accords Fitzh. but quære de hoc.

Note, divers were convicted in the time of Queen Eliz. upon the Statute of 2 H. 4. for the order and form [of 25 H. 8. was not observed, both which acts are repealed: So William Newburgesl. lib 2.cap.13. de hæretico comburendo in France.

Note, the High Commission may punish Heresies, and upon their conviction a Writ De hæretico comburendo. See the Act 6 R. 2. by which the Commons disavowed their assent to the act of 5 R.2. That Hereticks shall be imprisoned, &c. upon the Certificate of the Bishops, &c. and there the Commons declared, that it was not their intent to be justified, nor bound themselves, nor their Successors to Prelates, more then their Antecessors had done in time past.

Note well, the act 5 R.2. was contrived by the Prelates in the name of the Commons, whereas they never assented: And this private act of 6 R.2. not Printed, nor was it after divers Parliaments, as it may appear before.

Mich. 6. Jac. Regis.

Prohibition. IN the case of Langdale in this very Term, in a Prohibition to the high Commissioners, two points were moved; The one, if a Feme-covert may sue for Alimony before the high Commissioners. The other, if the Court of Common Pleas may grant a Prohibition, when no Plea is pendent in the Common Pleas: As in this case no Plea can there depend betwixt Husband and Wife. And forasmuch as this concerns the Jurisdiction of the Court, this was first of all debated, divers objections were made against it.

1. That this Court hath not Jurisdiction to hold Plea without an Original, unlesse it be by privilege of an Attorney, Officer, or Clerk of the Court, unlesse that it be in an especiall case, viz. when there is an action there

there depending for the ſame cauſe; then it was agreed that a Prohibition ſhall be awarded out of the Common Pleas, in reſpect that the Court hath an action there depending for the ſame cauſe, and ſo being poſſeſſed of the cauſe, it gave the Court Juriſdiction to award Prohibition out of the ſame Court: And for that the Prohibition ought to recite, Quod cum tale placitum pendet, &c. and the Defendant Pendente placito prædicto, hath purſued in Court Chriſtian: And with this accords, as hath been ſaid, F. N. B. 43. g. where it is ſaid, that if a man be ſued in the Common Pleas for a Treſpaſſe, if the Plaintiff alſo ſue in Court Chriſtian for the ſame cauſe, the Defendant may ſhew this in the Common Pleas, and ſhall have a Prohibition then directed to the Judges: And ſo alwaies when the matter is pendent in the Common Pleas, if ſuit be for the ſame cauſe in Court Chriſtian, he ſhall have a Prohibition: But a man ſhall have a Prohibition out of the Chancery, or Kings Bench upon his ſurmiſe, ſurmiſing that he is ſued in Court Chriſtian for a temporall cauſe: And 2 Ed. 4. 11. 6. was cited, where it is held that Ne admittas, which is a Prohibition, doth not lye unleſſe that the Quare impedit be pendent.

And it was anſwered and reſolved by Coke chief Juſtice, Warberton, Daniel, and Foſter, Juſtices, that the Common Pleas may award a Prohibition, although that no Suit be there pendent, for this, that the Common Pleas is the principall Court of Common Law for Common Pleas: For it belongs to the Juriſdiction of the Common Pleas to determine all Common Pleas.

Quia communia placita non ſequantur Curiam noſtram, as it is enacted by Magna Charta, which hath thirty times been confirmed by other acts of Parliament: Then if the Eccleſiaſticall Judges incroach upon the Juriſdiction of the Common Pleas to hold Plea of any thing againſt the Common Law of the Land, or of any thing triable by the Law, there the Principle Court of Common Law ſhall grant a Prohibition, and that without Originall Writ, for divers cauſes.

1. For that no Originall Writ which iſſues out of Chancery is returnable or into the Kings Bench or Common Pleas, but is directed to Judge, or party, or both, and is not returnable: But it appears in the Regiſter, that if the Prohibition be contemned, then the Chancellor may award an Attachment to puniſh this contempt, returnable or in the Common Pleas, or in the Kings Bench: But an Attachment in ſuch caſe is but as a Judiciall Writ; And this appears by the Regiſter, fol. And if the Attachment in ſuch caſe be returnable into the Common Pleas, &c. the Plaintiff in the Declaration ſhall make mention of an Originall Writ in the Chancery, and of the contempt, &c. as appears in a notable Preſident.

2. There was great reaſon that no Originall Writ of Prohibition ſhall be returnable, for the Common Law was a Prohibition in it ſelf, and he who did incroach upon the Juriſdiction of it incurred a contempt: And with this agrees our Books, as 9 H. 6. 56. in Attachment upon a Prohibition in the Common Pleas, William Babington then chief Juſtice of the Bench, concerning a Suit in Court Chriſt. of tythes of great Trees: And there Fulthorp the Serjeant took exception to the Count, for this, that the Plaintiff in his Count did not declare upon any Stat. nor that any Prohibition, Scil. Original Writ was directed unto him: And there it is held that the Statute of 45 Ed. 3. and the Common Law alſo was a Prohibition in it ſelf: And thus the rule of the Book, 19 H. 6. 54. Prohibition, for this, that one had ſued in a Court Baron againſt the Common Law; And there Aſcue ſaid, the Statute is a Prohibition in it ſelf, ſo is it held

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in 8 R. 2. title Attachment ſur Prohibition, 15. Note by Clopton in the Common Pleas, who then was a Serjeant, that if a Plea be held in Court Chriſtian, which belongs to the Court of the King, without any Prohibition in facto, the Plaintiff ſhall have an Attachment upon a Prohibition, for this, that the Law is a Prohibition in it ſelf, for by the Law they ought to hold no Plea, but that which doth belong to their Juriſdiction, Quod fuit conceſſum, &c. Regiſter 77. Eſtrepment. Præcipimus quod inhibeas, &c. Fitz. N. B. 259. Regiſt. 112. Superſedeas to a Court Baron, for holding plea Vi & armis, or above forty ſhillings: And F.N.B. a Writ of Conſultation is as much an Originall as a Prohibition, yet the Common Pleas hath granted infinite Conſultations, ergo Prohibitions, Qui habet juriſdictionem abſolvendi, habet juriſdictionem ligandi: And one Writ is as Originall as the other.

Note, there are many ſeverall Writs of expreſſe Prohibitions, Scil. Prohibitions with this word Prohibemus vobis, and Letters in nature of Prohibitions, as Superſedeas, by which it is commanded, Quod ſuperſed. in placito prædicto. And Injunction is a Prohibition, and alſo in its nature, for the words are an Injunction to the party, not to the Judge; And a Superſedeas is to an Officer or Judge, not to the party.

Prohibition of Waſt returnable out of Chancery, Quia returnabile. Expreſſe Prohibition are in two manners, the one founded upon a Suggeſtion, the other upon the Record; upon ſuggeſtion where plea is pendent, and yet the ſuggeſtion is the foundation, for it is not ſo without a plea pendent, but is founded upon Record when no plea is pendent, as ſhall be ſaid hereafter: For Prohibitions founded upon Record, Ne admittas ought to recite the plea pendent, for all thoſe which are founded upon Record ought to recite a plea pendent. So a Writ to the Biſhop to admit a Clark, is a Judicial Latitat, as Dyer defends it: And as to the Book of 2 Ed. 4. it is well agreed, that this doth not lye in the Common Pleas, unleſſe a Quare impedit be depending, for this ought to recite a Writ to be depending; and it ſhould be againſt reaſon to reſtrain any to preſent, or to make Waſt by Eſtrepment, unleſſe that a Writ be pendent: And as to the opinion of Fitzherbert, it was affirmed for good Law, for every one agrees it, that if a plea be pendent in the Common Pleas, then a Prohibition there lies, and the pendency or not pendency of a plea is not materiall for divers cauſes.

1. The pendency of a Plea may give a priviledge to the party, but no Juriſdiction to the Court in collaterall Suit: And there is a diverſity betwixt Priviledge of Court, and Juriſdiction of Court, for a Plea pendent may give priviledge to the party, Eundo, redeundo & morando, but doth not give Juriſdiction to the Court to hold plea by Bill by collaterall Suit againſt any other, as an Officer, Attorney or Clerk may.

2. The Prohibition in ſuch a caſe where plea is pendent is no proceſſe Judiciall upon the Record, for it is a collaterall Suit.

3. If the Common Pleas, which is the proper Court for Common Pleas, cannot grant a Prohibition without a Plea pendent; certainly the Kings Bench, which holds plea of Common Pleas by ſecondary means, cannot do it: And ſo the Arch-biſhop of Canterbury in his Articles concerning Prohibitions holds, that neither the one Court nor the other may grant Prohibitions in ſuch a caſe: But inaſmuch as the Common Law is inſtead of an Originall, as hath been ſaid, both Courts may grant it.

4. Infinite Preſidents may be ſhewn of Prohibitions out of the Common pleas, without recitall of any plea pendent, as is agreed on the other part: And true it is, that it ought to be, if the Court hath not Juriſdiction

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to grant any without plea pendent. Every petty Clerk of the Common Law shall have by his privilege a Prohibition without plea pendent: a fortiori, the Common Law it self may prohibite any one, who against the Common Law shall incroach upon its Jurisdiction, and enquire of things done against the Jurisdiction of the Court. Plea pendent is cause of privilege and not of Jurisdiction, 4 Ed. 4. 37. 37 H. 8. Action or information upon the Statute of 2 H. 5. cap. 5. is but an information to the Court of wrong done to the Common Law, for this, that no Originall Writ lies, as upon penall Law, upon Malum prohibitum, this is Malum in se de quo Curia intelligi & informari volunt.

5. A Precedent is in 22 Ed. 4. where a prohibition was granted out of the Common Pleas, for that the Plaintiff might have a Writ of false Judgment at the Common Law: The Record it self agrees with the Report, for the words of the Record are,

6. That Officers and Clerks, as well in the Common Pleas, as in the Exchequer, and Farmers of the King in the Exchequer, may have by privilege of Court a Prohibition without Originall; a fortiori, the Law it self shall have greater privilege then an Officer or Clerk, and certainly to enforce the party to bring an action, will be a means to multiply Suits to no end, for the Law it self in 4 Ed. 4 fol. 37. if any man upon the Statute of 2 H. 5. for not delivering of a Libell, be brought into the Common Pleas: And if he cannot have a Prohibition without such Suit, this shall be a cause, as hath been said, to multiply Suits, and is against the publick Weal; For he will bring his action upon the Statute before that he will be deprived of his Prohibition, and by that he gives himself cause of Prohibition; every Prohibition is as well at the Suit of the King as of the party, as is held in 28 Ed. 3. 97. false Latine shall not abate, nor excommunication in the plaint is no plea: For this is the Suit of the King, as well for his Jurisdiction as for the party, who by Law may choose his Court, 15 Ed. 3. title Corrody 4. The King may sue for this contempt where he pleaseth.

Note, that although the Originall cause was in the Kings Bench, for Corody, Excommunication is no plea in disability of the Plaintiff, because it is the Suit of the King for contempt to his Law, vide 21 H. 7. 21. Kelway 6. in quare non admisit, 4 Ed. 4. 37. for not delivery of a Libell in the Common Pleas, and then he shall have a Prohibition by all the Justices: so upon the Statute of 2 Ed. 6. cap. 13. for suing for Tythes where there is a prescription, &c. And this shall be to introduce multiplication of Suits, when himself gives cause of Prohibition, 28 H. 6. 14. 8 Ed. 4. 20. 13 Ed. 3. title Prohibition, 11. after a Judgment in the Common Pleas, after which the Patron sues the Rector in Chancery, surmising equity, Attachment upon a Prohibition out of the Common Pleas, yet no Plea pendent.

Note, the Reporter reported this Attachment to issue out of the Common Pleas, for the Chancellor would not prohibite him.

32 H. 6 34. An Attorney in the Palace assaulted and menaced, the Court shall take a Will and enquire of it, 4 Ed. 4. 36. 37. there a Prohibition without view of Libell, for this, that action was pendent, Statham Prohibition 3.

Prohibition super Articulos, title Prohibition plea 5. gives a Prohibition before Jest. Coram Justiciariis nostris apud West. vide F.N.B. fol 69. b. in a Writ of Pone, Register indic. coram Judiciarijs nostris apud West. is the Common Pleas, F.N.B. 64. d. 38 Ed. 3. 14. Statute 2. Ed. 6. cap. 13. such Courts grant Prohibitions who have used to grant them: Hales case in

my Reports. Note, the reason that many Prohibitions were granted in the Kings Bench, for that no Writ of Error lies but in Plaint.

Mich. 6. Jac.

Sur Statute de Winton.

Mich. 6. Jac. Rot. 639. Robert Banck Gent. brought an Action upon the Statute of Winton 13 Ed. 1. against the Inhabitants of the hundred of Burnham, in the County of Bucks. and counted, that certain Pitchers to the Plaintiff unknown at Hitcham in the County aforesaid, which Town is in the Hundred of Burnham, the 22. Novemb. An. Regni Regis Jacobi 3. assaulted the Plaintiff, and robbed him of 25 l. 3 s. 2 d. ob. and that the Plaintiff immediatly after the Robbery, scil. the 22. of Novemb. at Joplow and Manlow, in the County aforesaid, which were Townes next the said Town of Hitcham, within the said hundred, made Hue and Cry of the said Robbery, and gave notice of the said Robbery to the Inhabitants of the said Towns of Joplow and Manlow, and after the said Robbery, and within twenty dates before the purchase of the Writ, scil. 19. day of February, An. 5 at Dorney in the County aforesaid, the Plaintiff before Sir William Gerrard Knight, then Justice of Peace within the same County, and Inhabitant next to the said Hundred, being examined upon his Oath, according to the Statute 27 Eliz. the Plaintiff upon his Oath said, That he did not know the parties who did rob him, nor any of them: And since the said Robbery forty dates are past, and the Inhabitants of the said Hundred of Burnham, have not made amends of the said Robbery to the Plaintiff, nor the body of the Felons and Pitchers aforesaid, nor any of them have taken, nor answered their bodies, nor the bodies of any of them, but have suffered the Felons to escape, to which the Defendants plead (not guilty) and a Venire facias was awarded to the Sheriff, De vicineto of the Hundred of Stoke, which is the hundred next adjacent to the said Hundred of Burnham: And the Jury gave a Spetiall Verdict, they found that the Plaintiff was robbed, and that he made Hue and Cry in manner and form, as he hath counted, and found ever, that the Plaintiff was sworn before the said Sir William Gerrard, then being a Justice of Peace within the same County, and an Inhabitant next unto the Hundred of Burnham, and said upon his Oath in these English words, That he, on Thursday being the two and twentieth day of Novemb. 1604. riding under Hitcham Wood, in the Parish of Hitcham, within the Hundred of Burnham, was then and there set upon by two Horse-men, which then, nor at this present he did, nor doth know, and by them robbed and spoyled of the just Summ of 25 l. 3 s. 2 d. ob. not without great danger of his life: But whether the said Oath so taken, is true, according to the form and effect of the said Act of 27 Eliz. and according to the Count, the Jurors pray the direction of the Court.

Mich.

Mich. 6. Jac.

In the mansion of Trafpalle, brought by Mouse to his Cabinet, and a banquet of fruit there tempted, taken and eaten by the Mouse; the Case was, The Ferry-man of Wapping took forty seven Passengers into his Barge, to passe to London, and Mouse was one of them; and the Barge being upon the water, a great Tempest hapned, and a strong wind, so that the Barge and all the passengers were in danger to be drowned, if a Hogshead of Wine and other ponderous things were not cast out, for the safeguard of the lives of the men: It was resolved *Per totam Curiam*, that in a case of necessity, for the saving of the lives of the passengers, it was lawfull to the Defendant being a passenger to throw the Goods of the Plaintiff out of the Barge, with the other things in it, for *Quod quis ob necessitatem amittit sua facere, jure id facisse videtur*, to which the Defendant pleads all this speciall matter; and the Plaintiff replies, *De injuria sua propria absque tali causa*: And the first day of this Term, this Issue was tried, and it was proved directly, that if the things had not been cast out of the Barge, the passengers had been drowned: And that *Lowdell* was, they were ejected; some by one passenger and some by another. And upon this the Plaintiff was non-suit.

Bonum publicum.

It was also resolved, that although the Ferry-man for charge the Barge, yet for safety of the lives of Passengers in such a time and accident of necessity, it is lawfull for any passenger to cast the things out of the Barge: And the Owners shall have their remedy upon the for-charge against the Ferry-man, for the fault was in him upon the for-charge, but if no for-charge was, but the danger accrued only by the act of God, as by Tempest, no default being in the Ferry-men, every one ought to bear his losse for safeguard of the life of a man, *for Interest Reipublicæ quod homines conservantur*, 8 Ed. 4. 23. Bull. &c. 12 H. 8. 25. 28 H. 8. Dyer 28. plucking down of a house in time of fire, &c. and this *Pro bono publico, & conservatione vitæ hominis est bonum publicum*. So if a Tempest arise in the Sea, *Lowdell navis causa*, and for salvation of the lives of men, it may be lawfull for Passengers to cast over the Merchandises, &c.

Mich. 5. Jac.

Prohibitions del Roy.

Note, Die, upon Sunday the tenth of November, in this same Term, the King, upon complaint made to him by Bancroft Archbishop of Canterbury, concerning Prohibitions, the King was informed, that when question was made of what matters the Ecclesiasticall Judges have Cognisance, either upon the Exposition of the Statutes concerning Tythes, or any other thing Ecclesiasticall, grounded upon the Statute 1 Eliz. concerning the high Commission, or in any other case in which parties to not appeare authority in Law, the King by his Writ may command in his Royall person, and that the Judges are but his Delegates of the King, and that the King may take what Causes he shall please to determine, from the determination of the Judges, and retain it to himself, how the Archbishop said, that this was clearly so, that Tithe matters belonged to the King by the Law of God, to which it was answered by me, in the presence and with the clear consent of all the Justices of England and Barons of the Exchequer, that the King in his own person cannot

cannot adjudge any case, either criminall, as Treason, Felony, &c. or betwixt party and party, concerning his Inheritance, Chattels, or Goods, &c. but this ought to be determined and adjudged in some Court of Justice, according to the Law and Custom of England, and alwaies Judgments are given, Ideo consideratum est per Curiam, so that the Court gives the Judgment: And the King hath his Court, viz. in the upper house of Parliament, in which he with his Lords is the supream Judge over all other Judges; for if Error be in the Common Pleas, that may be reversed in the Kings Bench: And if the Court of Kings Bench erre, that may be reversed in the upper house of Parliament, by the King, with the assent of the Lords Spirituall and Temporall, without the Commons: And in this respect the King is called the chief Justice, 20 H. 7. 7. a. by
2 R. 3. 9. 21. H 7 8. Brudnell: And it appears in our Books, that the King may sit in the Star Chamber, but this was to consult with the Justices, upon certain questions proposed to them, and not in Judicio; so in the Kings Bench he may sit, but the Court gives the Judgment: And it is commonly said in our Books, that the King is alwaies present in Court in the Judgment of Law; and upon this he cannot be non-suit: But the Judgments are alwaies given Per Curiam; and the Judges are sworn to execute Justice according to Law and Custom of England. And it appears by the Acts of Parliament, of 2 Ed. 3. cap. 9. 2 Ed. 3. cap. 1. That neither by the great Seal, nor by the little Seal, Justice shall be delayed, ergo, the King cannot take any cause out of any of his Courts, and give Judgment upon it
17 H. 6 14. himself, but in his own cause he may stay it, as it doth appear, 11 H. 4. 8.
39 Ed. 3. 14. And the Judges informed the King, that no King after the Conquest assumed to himself to give any Judgment in any Cause whatsoever, which concerned the administration of Justice within this Realm, but these were solely determined in the Courts of Justice: And the King cannot arrest any man, as the Book is in 1 H. 7. 4. for the party cannot have remedy against the King, so if the King give any Judgment, what remedy can the party have, vide 39 Ed. 3. 14. One who had a Judgment reversed before the Councill of State: it was held utterly void, for that it was not a place where Judgment may be reversed, vide 1 H. 7. 4. Hussey chief Justice, who was Attorney to Ed. 4. reports, that Sir John Markham chief Justice said to King Ed. 4. That the King cannot arrest a man for suspition of Treason or Felony, as other of his Leiges may; for that if it be a wrong to the party grieved, he can have no remedy: And it was greatly marvelled that the Arch-bishop durst inform the King, that such absolute power and authority as is aforesaid, belonged to the King by the word of God, vide 4 H. 4. cap. 22. which being translated into Latine, the effect is, Judicia in Curia Regis reddita non annihilentur sed stet judicium in suo robore quousq; per judicium Curiæ Regis tanquã erroneum, &c. vide West. 2. cap. 5. vide le Star. de Marlbridge cap. 1. Provisum est concordatum & concessum, quod tam majores quam minores justitiam habeant & recipiant in Curia Domini Regis, & vide le Star. de Mag. Charta, cap. 29. 25 Ed. 3. cap. 5. None may be taken by petition or suggestion made to our Lord the King or his Council, unsesse by Judgment: And 42 Ed. 3. cap. 3. no man shall be put to answer without presentment before the Justices, matter of Record, or by due Processe, or by Writ Originall, according to the ancient Law of the Land: And if any thing be done against it, it shall be void in Law and held for Error, vide 28 Ed. 3. cap. 3. 37 Ed. 3. cap. 18. vide 17 R. 2. ex rotulis Parliamenti in Turri act. 10. A Controversie of Land between parties was heard by the King, and sentence given, which was repealed, for this, it did belong to the Common Law: Then the King said, that he thought the

Law

Law was founded upon reaſon, and that he and others had reaſon, as well as the Judges: To which it was anſwered by me, that true it was, that God had endowed his Majeſty with excellent Science and great endowments of nature, but his Majeſty was not learned in the Lawes of his Realm of England, and cauſes which concern the life, or inheritance, or goods, or fortunes of his Subjects; they are not to be decided by naturall reaſon, but by the artificiall reaſon and judgment of Law, which Law is an act which requires long ſtudy and experience, before that a man can attain to the cognizance of it; And that the Law was the Golden met-wand and meaſure to try the Cauſes of the Subjects, and which protected his Majeſty in ſafety and peace: With which the King was greatly offended, and ſaid, that then he ſhould be under the Law, which was Treaſon to affirm, as he ſaid; To which I ſaid, that Bracton ſaith, Quod Rex non debet eſſe ſub homine, ſed ſub Deo & Lege.

Mich. 8. Jac. Regis.

Court Eccleſiaſticall. Prohibition.

IN this Term, in the caſe of one Roberts, a Prohibition had been granted in a caſe of ſubſtraction of Tythes, upon ſurmiſe that the Plaintiff being Defendant in the Spirituall Court, had but one Witneſſe in that Court to prove his Demiſe, to which that Court ſaid, that Singularis teſtis is not allowable: And upon conſideration and ſight of a Prohibition granted upon the ſame cauſe in Hill. 3 Eliz. in banco Regis, it was reſolved by Coke chief Juſtice, Et totam Curiam in communi banco, that conſultation ſhould be granted, and that for divers cauſes.

1. It appears by the Regiſter fol. 5. that it is put for a rule, Quod non eſt conſonum rationi, quod cognitio acceſſorij in Curia Chriſtianitatis impediatur, ubi cognitio cauſæ principalis ad forum Eccleſiaſticum noſcitur pertinere: And with this agrees 1 R. 3, 4.

2. If ſuch a Surmiſe ſhall be allowed, then in every caſe for meer delay ſuch a Surmiſe may be made, for he who was Plaintiff in the Spirituall Court cannot deny, that where it is ſurmiſed that he hath one Witneſſe, that he hath two, or more, for then he affirms matter againſt himſelf: And when the Spirituall Court hath Juriſdiction of the principle Cauſe, they determine the acceſſory. But it was objected, that if A. claiming a Leaſe by B. of a Rectory, Libels for ſubſtraction of Tythes, and the Defendant pleads a former Leaſe made by B. and C. and the Defendant hath but one Witneſſe in the caſe to prove the former Leaſe, if no Prohibition ſhall be granted, the Defendant ſhall be charged: And if C. ſue him upon the Statute of 2 Ed. 6. at the Common Law, the teſtimony of one only will there be ſufficient, and ſo he ſhall be twice charged: To which it was anſwered, that firſt the fault was the Defendants, that he would not ſet forth his Tythes, and then he ſhall be charged whoſoever takes them: But in ſuch a caſe, thoſe of the Eccleſiaſticall Court will upon one good Witneſſe, and any concurrent vehement preſumption, as poſſeſſion, or the like, allow of ſuch a proof: And the teſtimony of Witneſſe in our Law is no concluſive evidence, but ought to be left to the conſcience of the Jury, and ſo the validity or invalidity of proof of matters of Fait ſhall be left to them, but if a queſtion of the Common Law ariſe from the party upon the conſtruction of a Statute, or the like, and thoſe of the Eccleſiaſticall Court will take upon them to judge of it againſt the rule of Law,

there upon ſpeciall ſurmiſe of it, And upon the ſhewing of the anſwer or other pleadings of the parties, by which it appears to the Court, that ſuch ſurmiſe is a good ground, a Prohibition lies for matter in Law, ariſing upon Eſtates or Intereſts done by the Common Law and conſtruction of Statutes, ought to be determined according to the rules of Common Law, Et non debet trahi ad aliud examen.

And Coke chief Juſtice cited a notable Judgment, Paſch. 35 Eliz. in banke le Roy. Fuller brought a Prohibition againſt Clements and Wiſkard; and Fuller counted that he himſelf was Owner of the Rectory of Longham in the County of Norfolk, and libelled againſt Clements, one of the Defendants, before the Officiall of the Biſhop of Norwich, for ſubſtraction of Tythes, ſcil. of Wheat, &c. pendent which Suit, the ſaid Wiſkard intervening Pro intereſſe ſuo, made theſe Allegations againſt the ſaid Fuller.

1. That the ſaid Rectory was impropriate to the Monaſtery of Wendling, and by the diſſolution of the ſaid Monaſtery, came to the hands of H. 8. and did convey it by Means diſcent to Queen Eliz. who by her Letters Patents of concealment granted it to Min, and Hall, who enfeoffed Bozome, who did let it to Wiskard for four years, and proved his Allegations by Witneſſes, upon which in fine ſentence was given againſt Fuller, and eight pounds ten ſhillings given to Clements for coſts, and thirteen pounds ſix ſhillings to Wiskard: And after Fuller did appeal to the Court of the Arches, and there Fuller claimed the ſaid Rectory by reaſon that Hall was ſeiſed of it, and by his Deed gave and granted the ſaid Rectory, and all Lands and Tythes to it appertaining to Sir Edward Clere, before the Feoffment ſuppoſed to be made to Bozome: And that Sir Edward Clere by his Deed did enfeoff Fuller; and although that he offered to prove the delivery of the Deed of the ſaid Feoffment made to Sir Edward Clere by one ſole Witneſſe, the Eccleſiaſticall Court would not allow it, without producing another Witneſſe: And Fuller further ſaid, that although he had further alledged there, that theſe were matters determinable at the Common Law, notwithſtanding they gave ſentence: the Defendants for to have a Conſultation pleaded, that Fuller in the ſaid Court of the Arches proved the Delivery of the Deed aforeſaid, by Sir Edward Clere and Mouſe, but could not prove Livery and Seiſin according to the Deed: And for this cauſe ſentence was given, without that the Judges of the Arches would not admit the ſaid proof, unleſſe he proved the Deed by other Witneſſes, upon which Fuller demurred in Law, and it was objected by the Counſell of Fuller,

1. That Wiskard, who is a meer ſtranger to the Suit, and who comes in Pro intereſſe ſuo in the ſaid Rectory, pleads matter meerly determinable at the Common Law, ſcil. Letters Patents, Feoffment, and Leaſe for years: And on the other part Fuller claimes an Eſtate in the ſaid Rectory, by conveyance at the Common Law. And now the queſtion in the Eccleſiaſticall Court being only who hath the beſt Eſtate in the ſaid Rectory by the Common Law; this ought to be tryed by the Common Law, and not in the Eccleſiaſticall Court, for this is the birth-right of the Subject to have his Inheritance and Free-hold tryed and determined by Common Law, for the Civill Law differs much in deciding of Inheritances.

2. It was objected, that all matters in Law ought to be determined by the Judges of the Law, and in this caſe matters of Law ariſing, ſcil. If a man hath a Rectory Impropriate, which conſiſts in Glebs and Tythes, and by his Deed gives and grants the ſaid Rectory, and all Lands and Tythes any way belonging or appertaining to it, to another and his heirs,

and

and no Liveris is made in this caſe, if the Tythes ſhall paſſe, or no, for that Tythes may paſſe without any Livery: This queſtion is not fit to be determined by the Eccleſiaſticall Judges, but by the Judges of the Common Law, Quod quiſque novit, in hoc ſe exerceat.

3. It was objected, that Wiskard was a meer ſtranger to the Suit, and all his Allegation is temporall, and for that it is a ſtronger caſe to maintain a Prohibition, foraſmuch as betwixt him and Fuller nothing is in queſtion, but to whom the Inheritance of the Rectory belongs; But Clements, who is ſued for ſubſtraction of Tythes, hath greater colour in his defence, being lawfully ſued in the Eccleſiaſticall Court, then for Wiskard, who is no party to the Suit for any Eccleſiaſticall cauſe, but all his Allegation, as hath been ſaid, is temporall.

4. It was objected, that Fuller had but one Witneſſe to proove the delivery of the Deed; and in the Eccleſiaſticall Law, Unus teſtis, eſt nullus teſtis: For all which cauſes it was prayed that the Prohibition may ſtand, and that no conſultation may be granted.

To which it was anſwered and reſolved by Sir Chriſtopher Wray chief Juſtice, and Per totam Curiam.

1. That to the firſt Objection, for that the Originall belongs to the Eccleſiaſticall Court, the determination of all that which depends upon it belongs to the Judges of the ſame Court, although that the matter be tryable by the Common Law; but where the Originall matter belongs to the Common Law, and there commenced, and iſſue be taken upon matter tryable by the Eccleſiaſticall Law, there the Judges of our Law ſhall write to the Judges of the Eccleſiaſticall Court to try it, and to certifie: and the reaſon of this diverſity is, that our Judges having authority to write and command them by the Kings Writ to certifie them, but they cannot write to the Judges of our Law to try any thing, and to certifie them, for they have no ſuch authority to command by Writ, but to obey the Writs of the King: As in any action Anceſtrall, if Baſtardy be pleaded in the Deſcendant, and upon this iſſue is joyned, this ſhall be tryed by the Biſhop, and his certificate ſhall binde: So in a Quare impedit, if iſſue be taken, whether a Clerk which was preſented was able, or not able, this ſhall be tryed by examination of a Clerk, and certified by the Biſhop: but although that ſuch iſſues are in their nature tryable by the Eccleſiaſticall Law, yet if the caſe was ſuch, that the Eccleſiaſticall Court could not try it, then (to the end that Juſtice ſhall not be wanting) ſuch Eccleſiaſticall matter ſhall be tryed by the Common Law, as 4 Ed. 3. 26. if the Preſentee be dead, if he was able, or not able, ſhall be tryed Per paijs, for the Biſhop cannot try it: But againſt this was objected the Statute de Articulis Cleri, cap. 13. by which it is provided, Quod de idoneitate Perſonæ perſonatæ ad beneficium Eccleſiaſticum pertineat examinatio ad Judicem Eccleſiaſticum, upon which it was concluded, that the tryall De idoneitate perſonæ, in all caſes belongs to Court Chriſtian; to which it was anſwered and reſolved, that true it is, that the tryall of ability belongs to them; but the Statute explains it in what manner it ſhall be made, for the Statute ſaith, Pertinet examinatio ad Judicem Eccleſiaſticum, ſo that this tryall ought to be by examination of the party, and this cannot be when the Preſentee is dead: And although he be not party to the Writ, yet he may be examined: And with this agrees 39 Ed. 3. 2. The Earl of Arundels caſe, and 4 Ed. 3. 25. 16 Eliz. Dyer 327. So if Baſtardy be alledged in one who is not party to the Writ, there, for this, that the Certificate binds for ever, it ſhould be againſt Law and reaſon that he ſhould not be party to the Certificate, for this cauſe in ſuch caſe it ſhall be tryed Per

paijs,

paijs, and if any difficulty ariſeth upon it, the Judges of our Law uſe to conſult with the Judges Eccleſiaſtical: and with this accords 4 Ed. 3. 37. The ſame Law of profeſſion, 42 Ed. 3:8. So if Baſtardy be alledged in one who is dead, vide 17 Ed. 3. 5: where Baſtardy is alledged in the Tenent, and one who is a ſtranger to the Writ, who are Sitters, vide 32 Ed. 3. tryall 59. where the Tenent alledgeth Baſtardy in himſelf, and the Demandant doth aver him Mulier, vide 29 Aſſ. pl: 14. 6 Eliz: Dy: 226. 228. If the Iſſue be Quod vacavit per reſignationem, part of which is temporal and part ſpiritual, this ſhall be tryed Per paijs, vide 9 H. 7. Profeſſion and the time of it, &c. But admiſſion and inſtitution, although that it be alledged in a ſtranger to the Writ, yet this ſhall be tryed by the Ordinary; as it appears 7 Ed. 6. 78. 6. in Dyer, for Admiſſion, Inſtitution, Reſignation, Et ſimilia, are judicial acts, and remain in their Courts and Regiſter, upon which they ground their Certificate, otherwiſe it is of Baſtardy, Idoneity, &c. by which it appears, that in divers caſes the Judges of the Common Law write to the Eccleſiaſticall Judges, commanding them to certifie ſome thing put in iſſue; and the Judges of our Law prohibite the Judges Eccleſiaſtical to hold Plea of ſome things which are determinable at Common Law: But the Court Eccleſiaſtical hath not power to write to our Judges, or to command them, or to prohibite them when they hold Plea of things determinable by the Eccleſiaſtical Judges; but this is erroneous, and ſhall be reverſed by Error. And of the other ſide, if in the Eccleſiaſtical Court the Suit is for a Legacy, & the Defendant plead a Releaſe, if in the admitting or rejecting of proofs concerning this Releaſe, which is matter determinable at Common Law, they do wrong to the Plaintiff or Defendant, they have no remedy but by way of appeal.

2. To the ſecond it was anſwered and reſolved, that if upon Conſultation with men learned in the Law, they give ſentence according to Law, this is wel done, and no Prohibition ought to be granted; but if they take upon them to draw the Intereſt of any man, Ad aliud examen, and to judge againſt the Rule of Law, concerning the Inheritance or Intereſt of any, there Prohibition lies: And in the caſe at the Bar, they wel reſolved the Law, for by the ſaid Livery of the Charter the Tythes do not paſſe as in groſſe, for this, that the intention of the parties was to paſſe the entire Rectory by Feoffment, and not to paſſe the Tythes by the ſame, and ſo to diſmember the Rectory by Fractions, and that by conſtruction of Law, againſt the intention of the parties.

3. As to the third, it was anſwered and reſolved, that by the Eccleſiaſtical Law a ſtranger may come in Pro intereſſe ſuo; And when they have juriſdiction of the Original cauſe of the Suit, we ought not to draw in queſtion their order and proceeding, but if they proceed inverſo ordine, or not obſerving form, this ought to be redreſſed by appeale: And although that the matter depending upon the Original cauſe be determinable by the Common Law, yet it ſhall be determined, as it hath been ſaid, in the Eccleſiaſtical Court.

4. As to the fourth objection, it was anſwered and reſolved, that ſuch a Surmiſe, that he hath but one Witneſſe, is not ſufficient to have a Prohibition, for this, that the Eccleſiaſtical Court hath Juriſdiction of the Principle, and if ſuch a Surmiſe ſhall be ſufficient, all Suits in the Eccleſiaſtical Court ſhall be either delayed, or quite taken away, for ſuch a Surmiſe may be made in every caſe; and the Plaintiff in the Eccleſiaſtical Court cannot have any good anſwer to it to have a Conſultation, which agrees with the reſolution in the principle Caſe, &c.

It

It was reſolved, upon evidence, by Coke chief Juſtice De banco, inter I.S. who informed upon the Statute of Uſury, and Smith, that the parties to the ſuppoſed uſurious Contract ſhall not be admitted Witneſſes, for this, that upon the matter they were Teſtes in propria cauſa, and by their Oath ſhal avoid their Bond, &c. or ſhall be revenged on him who lent them the money, before they are enforced to repay it: And for the moſt part they incite, and raiſe up one of their own Servants, to inform and have part of the thing recovered.

High Commiſſioners.

Trin. 8. Jacobi Regis.

UPon a Habeas Corpus by Eliz. Lady Throgmorton, Priſoner in the Fleet, the return was, The Lady Throgmorton was committed by George Biſhop of London and others Eccleſiaſticall Commiſſioners, under their hands, till further order ſhould be taken for her enlargment: And the cauſe of commitment of her was, for that ſhe had done many evill offices betwixt Sir James Scudamore, and her Daughter the Lady Scudamore, Wife of the ſaid James, and to make ſeparation betwixt them, and detained her from her Husband: And upon her departure after ſentence before the Commiſſioners, for divers contemptuous words againſt the Court, ſaying, that ſhe neither had Law nor Juſtice there: And it was reſolved, that for detaining of the Wife, and endeavouring to make ſeparation, no Suit can be before the high Commiſſioners, for that it is not any enormous offence within the meaning of the Act.

2. for the detaining of the Wife, there is remedy by the Common Law.

3. Without queſtion, for ſuch an Offence they cannot impriſon the Wife.

4. By the words it doth not appear, that they were ſpoken in the Court.

2ly. It is no Court of Record, for that they proceed according to the Civill Law, and it is like the Admiralty Court; and for this they cannot impriſon, for none ſhall be committed for miſdemeanour in Court, unleſſe that the Court be of Record.

5. It doth not appear by the return what Court this was, which is uncertain; And upon this upon good conſideration ſhe was bayled.

But Randal and Hickins was this very Term committed by the high Commiſſioners, for that they were vehemently ſuſpected to be Brownists, &c. And they obtained a Habeas Corpus, and were remanded for this, that the high Commiſſioners have power to commit for Hereſie, as appears at large in my Treatiſe, concerning the authority and power of the high Commiſſioners.

The Lord of Aburgavenyes *Caſe*.

The Writ doth not make a Peere, &c.

IN the Parliament a queſtion was made by the Lord of Northampton, Lord priuy Seale, in the upper houſe of Parliament; That one Edward Nevil, the Father of Edward Nevil, Lord of Aburgaveney, which now is, in the 2, and 3. of Queen Mary, was called by Writ to Parliament, and died before the Parliament: If he was a Baron, or no, and ſo ought to be named, was the queſtion; and it was reſolved by the Lord Chancellor, the two chief Juſtices, chief Baron, and divers other Juſtices there preſent, that the direction and delivery of the Writ did not make a Baron or Noble, until he did come to the Parliament, and there ſit, according to the commandment of the Writ, for until that, the Writ did not take its effect, & the words of the Writ were wel penned, which are, Rex & Regina, &c. Edwardo Nevil de Aburgaveney Chivalier, quia de adviſamento & aſſenſu concilii noſtri pro quibuſdam arduis, & urgentibus negotiis ſtatum & defenſionem Regni noſtri Angliæ concernentibus, quoddam Parliamentum noſtrum apud Weſtmonaſterium, 21. die Octobris proximo futuro teneri ordinavimus, & ibidem vobiſcum, ac cum Prælatis, Magnatibus & Proceribus dicti regni noſtri colloquium habere & tractatum, vobis in fide & Ligeantia, quibus nobis tenemini, firmiter jungendo mandamus, quòd conſideratis dictorum negotiorum arduitate & periculis iminentibus, ceſſante excuſatione quacunque, dictis die & loco perſonaliter interſitis nobiſcum, ac cum Prælatis, Magnatibus ac proceribus ſupradictis, ſuper dictis negotijs tractaturis veſtrumque conſilium impenſur. & hoc ſicut nobis, &c. And in the 35 H. 6 46. and other Books, he is called a Peer of Parliament, the which he cannot be until he ſit in Parliament, and he cannot be of the Parliament until the Parliament begin: And forasmuch as he hath been made a Peer of Parliament by Writ (by which implicitly he is a Baron) the Writ hath not its operation and effect, until he ſit in Parliament, there to conſult with the King and the other Nobles of the Realm; which command of the King by his Superſedeas may be countermanded, or the ſaid Edward Nevil might have excuſed himſelf to the King, or he might have waved it, and ſubmitted himſelf to his Fine, as one who is diſtrained to be a Knight, or one learned in the Law is called to be a Serjeant, the Writ cannot make him a Knight, or a Serjeant; And when one is called by Writ to Parliament, the order is, that he be apparrelled in his Parliament Robes, and his Writ is openly read in the upper houſe, and he is brought into his place by two Lords of Parliament, and then he is adjudged in Law, Inter pares Regni, that is to ſay, Ut cum olim Senatores e cenſu eligebantur, ſic Barones apud nos habiti fuerint, qui per integram Baroniam terras ſuas tenebant, ſive 13. feoda militum, & tertiam partem unius Feodi militis, quolibet Feodo computato ad 20l. quæ faciunt 400. marcas denarij erat valentia unius Baroniæ integræ, & qui terras & redditus ad hanc valentiã habuerint, ad Parliamentum ſummoniri ſolebant; So that by this it appears, that every one who hath an entire Barony may have of right and of courſe a Writ to be ſummoned to Parliament, for without Writ none can ſit in Parliament: And with this agrees our Books, for Una voce they agree, that none can ſit in Parliament as Peer of the Realm, without matter of Record, and if Iſſue be taken, whether a Baron or no Baron, Earl, or no Earl, this ſhall not be tryed Per pais, but by the Record, by which it appears, that he was a Peer of Parliament, for without matter of Record he cannot be a Peer of Parliament

liament, 35 H.6.46.48 Ed 3.30.b. 48 Aſſ: pl: 6. 22 Aſſ: pl: 24. Regiſter, 287. Henricus tertius poſt magnas perturbationes & enormes exactiones inter ipſum Regem, Simonem de monte forti, & alios Barones motas & ſuſceptas ſtatuit & ordinavit, quod omnes illi Comites & Barones regni Angliæ, quibus ipſe Rex dignatus eſt brevia ſummonitionis dirigere, venirent ad Parliamentum, & non alii niſi forte Dominus Rex alia illa brevia eis dirigere voluiſſet: Which Act or Statute continues in force to this day, ſo that now none, although that he hath an entire Barony, can have a Writ of Summons to Parliament without the Kings Warrant, under the privy Seal at leaſt.

But if the King create any Baron by Letters Patents under the great Seal to him and to his Heirs, or to him and to his Heirs of his body, or for life, &c. there he is a noble man preſently, for ſo he is expreſly created by Letters Patents of the King, which cannot be countermanded: And he ought to have a Writ of Summons to Parliament of right and of courſe, and he ſhall be tryed by his Peers, if he ſhall be arraigned before any Parliament, but ſo ſhall not he be who is called by Writ, until he ſits in Parliament, which is the diverſity.

Richard the ſecond created John Beauchamp of Holt, Baron of Kiderminſter, by Letters Patents, dated 10. Oct. 11. year of his Raign, where all others before him were created by Writ.

Trin. 8. Jac.

IN this very Term Thomas Oldfield came out of the Court of the Dutchy, and before he came into Weſtminſter Hall, with a knife ſtabbed one Ferrar, a Juſtice of Peace, of which he died: And if Oldfield ſhould have his right hand cut off, was the queſtion before the two chief Juſtices, chief Baron, Walmſley, Warberton, Foſter, and divers other Juſtices; And it was reſolved, no, for it ought to be in the Hall of Weſtminſter, Sedentibus Curijs, as it appears in 3 Eliz. Dyer 188. 41 Ed. 3. title Coron. 280. And a Preſident was ſhewn, An. 9 Eliz. in Banco le Roy, where one Robert Gerling ſmote one in Whitehall, ſitting in the Court of Requeſts, and was but fined and raniomed: The ſame Law if one ſmite one in the Court of the Dutchy, &c. But if one ſmite another before the Juſtices of Aſſiſe, there his right hand ſhall be cut off, as it appears 22 Ed. 3. fol. 13. & 19 Ed. 3. title Judgment. And one Bellingham, An. 2 Jac. in the Hall of Weſtminſter, Sedentibus Curijs, with his Elbow and Shoulder out of malice juſtled Anthony Dyer of the inner Temple, ſo that he over-threw him, and with his feet ſpurned him upon the Legs, but did not ſmite him neither with his hand, nor with any Weapon: And yet it was held that this right hand ſhould be cut off, &c. upon which Bellingham was indicted in Banck le Roy, and after obtained his pardon.

A Caſe was put to all the Juſtices of England, which was ſuch; The Biſhoprick of Waterford and Liſmore, being originally two Biſhopricks diſtinct, were by lawfull authority in the Raign of H. 3. united and conſolidated, but the Chapters yet remain ſeveral: After which union the Biſhop alienes Lands of the See of Waterford, and alienes Lands of the See of Liſmore, with the confirmation of the Chapter of Liſmore, the queſtion

ſtion was, whether ſuch Alienations are not voidable by the Succeſſor, being without the confirmations of both the Deans and Chapters. The ſecond queſtion was, whether the Queen might avoid ſuch Alienations Contra formam collationis, by Seiſure, or otherwiſe: And the Juſtices demanded a view of the Union; to which it was anſwered, That it was not extant: then it was reſolved by the Juſtices, that inaſmuch as the uſage hath been after the ſaid Union, that the ſeverall Deans and Chapters have ſeverally made confirmations, ut ſupra; it ſhall be intended that the Union was made eſpecially in ſuch manner, ſcil. That notwithſtanding the Union, yet for avoiding of confuſion, and in reſpect of the remoteneſſe of the Deaneries and Chapters, that Eſtates made ſhall be ſeverally confirmed, as before the Union, and then ſuch confirmations ſhall be good, for in ſuch caſe, Modus & conventio vincunt Legem, but if the Union was made generally, and the Biſhop eligible by both Chapters, then Eſtates made ought to be confirmed by both the Chapters, vide 50 Edw. 3. title Aſſiſe Statham, the time of R. 2. title Grant, 27 H. 8. Dyer 58. 11 Eliz. Dyer, 33 H. 8. cap.

It was reſolved, that upon a lawfull Alienation made, with confirmation of the Dean and Chapter, no Contra formam collationis lyeth upon the Statute of Weſtmin. 2. as hath been reſolved in the ſeventh part of my Reports.

Trin. 8. Jac.

Convocation. NOte, it was reſolved by the two chief Juſtices and divers other Juſtices, at a Committee before the Lords in the ſame Parliament, divers points concerning the authority of a Convocation.

1. That a Convocation cannot aſſemble at their Convocation without the aſſent of the King.

2. That after their aſſembly they cannot confer to conſtitute any Cannons without licenſe del Roy.

3. When they upon conference conclude any Cannons, yet they cannot execute any of their Cannons without Royall aſſent.

4. They cannot execute any after Royall aſſent, but with theſe four limitations.

1. That they be not againſt the Prerogative of the King.
2. Nor againſt the Common Law.
3. Nor againſt any Statute Law.
4. Nor againſt any Cuſtome of the Realm.

And all this appears by the Statute 25 H. 8. cap. 19. and this was but an affirmance of what was before the ſaid Statute, for that it appears by the 19 Ed. 3. tit. Quare non admiſit, 7. where it is held, that if a Cannon Law be againſt the Law of the Land, the Biſhop ought to obey the commandment of the King, according to the law of the Land, 10 H. 7. 17. there is a Cannon that no Spirituall perſon ſhall be put to anſwer before a ſecular Judge; But this does not bind, becauſe it is againſt the Common Law: And it appears by the Statute of Merton cap. 9. that they in caſe of Baſtardy were enforced to certifie againſt the Law of holy Church, that Nati ante matrimonium fuerint Baſtardi, quia Eccleſia habet tales pro legitimis, & rogaverunt omnes Epiſcopi Magnates quod conſentirent, quod qui nati fuerint ante

ante matrimonium essent legitimi, which proves, that the Cannon Law in this point being repugnant to the Law of the Land, was not of any force: And for this, they imployed the aid of the Parliament, Et omnes Comites & Barones una voce responderunt, quod nolumus leges Angliæ mutare, quæ huc usque usitatæ sunt & approbatæ.

2 H.6.13. A Convocation may make Constitutions, by which those of the Spiritualty shall be bound, for this, that they all, or by representation, or in person are present, but not the temporalty.

21 Ed:4.47. The Convocation is Spirituall, and all their Constitutions are Spirituall, vide the Records in the Tower of 18 H.8. 8 Ed.1. 25 Ed. 1.11 Ed.2.& 15 Ed.2.

Prohibitio Regis ne Clerus in Congregatione sua,&c. attempter contra jus seu Coronam: alia,ne quod statuat in Concilio suo in præjudicium Regis seu legis,&c. By which it appears, that they can do nothing against the Law of the Land, for every part of the Law, be it Common Law, or Statute Law, cannot be abrogated nor altered without an Act of Parliament, to which every one shall be party, except the Spirituall Causes, or which concerns Spirituall persons, if it be against the Prerogative of the King and the Common Law.

Piracy, Trin. 8. Jac.

IN this very Term the King referred the consideration of Letters Patents of the Lord Admirall of England, to the two chief Justices, and the chief Baron, whether by the said Letters Patents, the Goods which Pirates should take from others by robbery and Piracy did passe to the Lord Admiral, or no? And upon the consideration of the said Letters Patents it appeared to us, that he had Bona & Chattalla Piratorum, and also Bona & Chatalla deprædata, id est, the Goods robbed from others, which did not passe for two Causes.

1. If the King grant Bona & Chattalla felonum, the Patentee shall have the Goods and Chattels of the Felon himself, in which he hath property, but he shall not have the Goods and Chattels which the Felon stealeth from others.

2. The Goods taken from others the King cannot grant, for it appears by the Statute 27 Ed. 3, cap. 8 St. 2. that the Merchant, &c. so robbed shall be received to prove, that the Goods and Chattels belong to him by his Chart or Cocket, or by other lawfull proof of Merchants, &c. the said Goods shall be delivered without any Suit at the Common Law, which Act is generall, be the Robber privy or a stranger: But it was resolved, that untill such proof be made, the King may seise the said Goods; for Goods of which the property is unknow, the King may seise; And if they are Bona peritura, the King may sell them, and upon proof, &c. restore the value. And note, the Statute doth not limit the Owner in case of depredation to any certain time to prove the property of the same Goods, as ought to be in case of Wreck, vide Stat 31 H. 6. cap. 4. vide 2 R. 2. cap. 2. 15 Ed. 4 9. 10. a good resolution of the Justices. And the Register

129. F. N. B. 114. when a Subject of the King, who is ſpoyled beyond the Seas, ſhall have a Writ, &c. for to take Goods within England, &c.

Simony, Trin. 8. Jac.

IT was agreed ad menſam, by all the Juſtices and Barons in Fleetſtreet, that if the Patron for any money preſent any perſon to any Benefice with cure, &c. that then every ſuch preſentation and the admiſſion, inſtitution and induction therupon are void, although that the Preſentee be not party nor priy to it, for the Statute intends to punish the wicked avarice of corrupt exactions, by the loſſe of his Preſentation, hac vice, and the Statute gives the Preſentation to the Queen: And all this Per verba ſtatuti, which is penned ſtrongly enough againſt corrupt Patrons.

Proclamations, Mich. 8. Iacobi.

Proclamation cannot make that an offence which was not.

MEmorand. That upon Thurſday, 20. Sept 8 Regis Jacobi, I was ſent for to attend the Lord Chancellor, Lord Treaſurer, Lord priy Seal, & the Chancellor of the Dutchy, there being preſent the Attorney, the Solicitor, and Recorder: And two queſtions were moved to me by the Lord Treaſurer; the one if the King by his Proclamation may prohibit new Buildings in and about London, &c. The other, if the King may prohibit the making of Starch of Wheat; And the Lord Treaſurer ſaid, that theſe were preferred to the King as grievances, and againſt the Law and Juſtice: And the King hath anſwered, that he will confer with his priy Council, and his Judges, and then he will do right to them; To which I anſwered that theſe queſtions were of great importance. 2. That this concerned the anſwer of the King to the body, viz. to the Commons of the houſe of Parliament. 3. That I did not hear of theſe queſtions untill this morning, at nine of the Clock, for the grievances were preferred, and the anſwer made when I was in my Circuit. And laſtly, both the Proclamations, which now were ſhewed, were promulgated, An: 5 Jac. after my time of Attorney-ſhip: And for theſe reaſons I did humbly deſire them that I might have conference with my Brethren the Judges about the anſwer of the King, & then to make an adviſed anſwer according to law and reaſon. To which the Lord Chancellor ſaid, that every Preſident had firſt a commencement, and that he would adviſe the Judges to maintaine the power and Prerogative of the King; and in caſes in which there is no authority and Preſident, to leave it to the King to order in it according to his wiſdome, and for the good of his Subjects, or otherwiſe the King would be no more then the Duke of Venice; And that the King was ſo much reſtrained in his Prerogative, that it was to be feared the bonds would be broken: And the Lord priy Seal ſaid, that the Phyſitian was not alwaies bound to a Preſident, but to apply his Medecine according to the quality of the diſeaſe: And all concluded that it ſhould be neceſſary at that time to confirm the Kings Prerogative with our Opinions, although that there were not any former Preſident or Authority in Law, for every Preſident ought to have a Commencement.

To

To which I answered, That true it is, that every President hath a Commencement, but when Authority and President is wanting, there is need of great considerations, before that any thing of novelty shall be established, and to provide that this be not against the Law of the Land: for I said, that the King cannot change any part of the Common Law, nor create any Offence by his Proclamation, which was not an Offence before, without Parliament. But at this time I only desired to have time of consideration and conference with my Brothers, for Deliberandum est diu, quod statuendum est semel; To which the Solicitor said, that divers Sentences were given in the Star Chamber upon the Proclamation against building, and that I my self had given sentence in divers cases against the said Proclamation: to which I answered, that Presidents were to be seen, and considerations to be had of this upon conference with my Brethren, for that Melius est recurrere, quam male currere; And the Indictment concludes, Contra leges & statuta; but I never heard an Indictment to conclude, Contra Regiam Proclamationem. At last my motion was allowed, and the Lords appointed the two chief Justices, chief Baron, and Baron Altham to have consideration of it.

Rejoynder to Attorney Generall's reply, touching the precedents, &c.

Note, the King by his Proclamation, or other waies, cannot change any part of the Common Law, or Statute Law, or the Customs of the Realm, 11 H 4.37. Forteſcue in laudibus Angliæ legum, cap.9.18 Ed.4.35,36.&c. 31 H.8.cap.8. hic infra: Also the King cannot create any Offence by his Prohibition or Proclamation, which was not an Offence before, for that was to change the Law, and to make an Offence which was not, for, Ubi non est lex, ibi non est transgressio, ergo that which cannot be punished without proclamation, cannot be punished with it, vide le Stat. 31 H.8. cap.8 which Act gives more power to the King then he had before, and yet there it is declared, that proclamation shall not alter the Law, Statutes, or Customs of the Realm, or impeach any in his Inheritance, Goods, body, life, &c. But if a man be indicted for a contempt against a Proclamation, he shall be fined and imprisoned, and so impeached in his body and goods, vide Forteſcue, cap.9.18.34.36,37.&c.

But a thing which is punishable by the Law, by fine and imprisonment, if the King prohibit it by his Proclamation, before that he will punish it, and so warn his Subjects of the peril of it, there if he commit it after, this as a Circumstance aggravates the Offence; But he by Proclamation cannot make a thing unlawfull, which was permitted by the Law before: And this was well proved by the ancient and continuall forms of Indictments, for all Indictments conclude, Contra legem & consuetudinem Angliæ, or Contra leges & statuta, &c. but never was seen any Indictment to conclude Contra Regiam proclamationem.

So in all cases the King out of his providence, and to prevent dangers, which it will be too late to prevent afterwards, he may prohibite them before, which will aggravate the Offence if it be afterwards committed: And as it is a grand Prerogative of the King to make Proclamation (for no Subject can make it without authority from the King, or lawfull Custom) upon pain of fine and imprisonment, as it is held in the 22 H. 8. Procl.B. but we do finde divers Presidents of Proclamations which are meerly against Law and reason, and for that void, for, Quæ contra rationem Juris introducta sunt, non debent trahi in consequentiam.

An Act was made, by which Forraigners were licensed to Merchandize within London, H.4. by Proclamation prohibited the execution of it, and that it should be in suspence Usque ad proximum Parliamentum, which was against Law, vide dors. claus. 8 H 4. Proclamat. in London: But 9 H. 4.

An

An Act of Parliament was made, That all the Irish people should depart the Realm, and go into Ireland before the feast of the Nativity of the blessed Lady, upon pain of death, which was absolutely in terrorem, and was utterly against the Law.

Hollinshead 722. An. Dom: 1546. 37 H.8. the Whore-houses called the Stews, were suppressed by Proclamation, and sound of Trumpet, &c.

In the same Term it was resolved by the two chief Justices, chief Baron, and Baron Altham, upon conference betwixt the Lords of the privy Council and them, that the King by his Proclamation cannot create any Offence which was not an Offence before, for then he may alter the Law of the Land by his Proclamation in a high point, for if he may create an Offence where none is, upon that ensues fine and imprisonment: Also the Law of England is divided into three parts, Common Law, Statute Law, and Custom; But the Kings Proclamation is none of them: Also Malum, aut est malum in se, aut prohibitum, that which is against Law is malum in se; malum prohibitum is such an Offence as is prohibited by Act of Parliament, and not by Proclamation.

Also it was resolved, that the King hath no Prerogative, but that which the Law of the Land allows him.

But the King for prevention of Offences, may by Proclamation admonish his Subjects that they keep the Lawes, and do not offend them, upon punishment to be inflicted by the Law, &c.

Lastly, if the offence be not punishable in the Star Chamber, the Prohibition of it by Proclamation cannot make it punishable there: And after this resolution, no Proclamation imposing Fine and Imprisonment, was afterwards made, &c.

Tribuno plebium interrogance.

Mich. 8. Jac.

No Prohibition after the Writ *De excommunicato capiendo.*

NOte, it was resolved in the same Term, that if a man be excommunicated by the Ordinary, where he ought not to be, as after a generall pardon, &c. and the Defendant being negligent doth not sue a Prohibition, but remains excommunicate by forty daies, and upon Certificate in Chancery, he is taken by the Kings Writ De excommunicato capiendo, that no Prohibition lies in this case, for that he is taken by the Kings Writ, and no President or Authority can be found where a Prohibition was granted after the party was taken by the Kings Writ; for Prohibition lies to prohibite Ecclesiasticall proceedings, not any thing which is done by the Kings Writ by force of the Common Law; and if a Prohibition be granted, it will not deliver the party: Then it was moved, what remedy hath the party who is so wrongfully excommunicated? To which it was answered, that he hath three remedies, viz.

1. He may have a Writ out of Chancery to absolve him, for as it is held in 14 H. 4. fol. 14. In all cases where a man is excommunicated by the Bishop against our Law, he shall have a Writ out of the Chancery directed to the Bishop, commanding him to assoil him: And with this agrees 7 Ed. 4. 14.

2. When a man is excommunicated against the Law of this Realm, so that he cannot have a Writ de Cautione admittenda, for then he ought

Parere

Parere mandatis Eccleſiæ in forma Juris, id eſt, Eccleſiaſtici, where in truth it is Excommunicatio contra jus & formam Juris, id eſt, communis juris: But if he ſhew his cauſe to the Biſhop, and requeſt him to abſoil him, for this, that he was excommunicated after the Offence was pardoned, or for this, that the cauſe doth not appear to Eccleſiaſticall Cognizance, and he refuſe to abſoil him, ſo that he is now diſabled to ſue any Writ of the King, ſo long as he remains excommunicated, he may have an Action ſur le caſe againſt the Ordinary, who hath done him this wrong, to diſable him in this caſe; and with this agrees the Dr. & Stud. lib. 2. cap. 32. fol. 119.

3. If the party be excommunicated for none of the cauſes mentioned in the Act of 5 Eliz. cap. 23. then he may have this for plea in the Kings Bench by the ſame Act, and avoid the penalties inflicted by the ſame Act.

Note; it was reſolved by the Court, &c. that where one is cited before the Dean of the Arches in cauſe of defamation, for calling the Plaintiff Whore, out of the proper Dioceſſe, ſcil. the Dioceſſe of London againſt the Statute of 23 H. 8. and the Plaintiff hath ſentence, and the Defendant is excommunicated, and ſo continues eighty dates: And upon Certificate into the Chancery, a Writ of Excommunicato capiendo is granted, and after the Defendant is taken and impriſoned by force of it, that he ſhall not have a Prohibition upon the Statute 23 H. 8. for no Writ in the Regiſter extends to it, Et ſententia, ſi quam fulminaveritis, ſine delatione revocetis, and after ſentence is appealed, and Prohibition lies, as appears by the Regiſter: But no Writ nor Preſident can be ſhewn in this caſe, but there is a Writ in the Regiſter called a Writ De cautione admittenda, when the Defendant is taken by the Kings Writ De excommunicato capiendo, de parendo mandatis eccleſiæ, and to abſoil and deliver the Defendant: But note a diverſity, where it appears to the Court, that the matter of the Libell is not within their Juriſdictions, as of Ley-fees, or of Ley-contract, &c. there lies a Prohibition with clauſe to deliver the party, for there he cannot find caution De parendo mandatis Eccleſiæ, for this, that Mandata Eccleſiæ, are contra legem & extra juriſdictionem ſuam: But in the caſe at the Bar, although it appears by the Libel, that the Defendant was of one ſuch Pariſh in Lond. yet inaſmuch as the Stat. 23 H. 8. hath many exceptions, ſcil. That the Ordinary requeſt the Arch-biſhop &c. to examine the caſe, &c. ſo that the ſaid defamation being the matter of the Libell, is of Eccleſiaſticall Cognizance, and the Statute hath many exceptions, ſo that it doth not appear to us judicially without information, that the Citation is againſt the form of the Statute; and this information comes too late in this caſe after the Defendant hath perſiſted ſo long in his contumacy, and is taken by the Kings Writ and impriſoned.

Admiralty.

IT was reſolved Per totam Curiam, that if one be ſued in the Admiralty Court for a thing alledged to be done upon the high Sea, within the juriſdiction of the Admiral, & the Defendant plead to it, and confeſſe the thing to be done, and after ſentence is given the Court will be adviſed to grant a Prohibition, upon Surmiſe, that it was done Infra corpus Comitatus, againſt their own confeſſion, unleſſe it can be made to appear to the Court

The Court cannot grant Prohibition after ſentence

by any matter in writing, or other good matter, that this was done upon the Land, for otherwiſe every one will ſtay untill after ſentence: And then for vexation only ſue out a Prohibition; for although the admittance of the party cannot give a Juriſdiction to the Court where it of right hath none, for that it will be an encroachment upon the Common Law, yet when the Court ſhall be adviſed that this is meerly for vexation, and ſhall be intended for delay, if Prohibition ſhall not be ſued till after ſentence, unleſſe that he can ſhew good matter to the Court to aſcertain the Court that this is not for vexation: And admonition was given to them which ſue for Prohibitions, that they ſhould not keep them by long time in their hands, and notwithſtanding proceed in the Eccleſiaſticall Court, &c. and when he perceives that he cannot prevail, then to caſt his Prohibition; for if they abuſe that liberty to the damage and vexation of the party, we will take ſuch order as in caſe of a Writ of Priviledge, if the Defendant keep it untill the Jurors are ready, &c. it ſhall not be allowed, but proceſſe ſhall be granted, for this, that it appears, that it is meerly for delay.

Hil. 8. Jac.

IN this very Term in the caſe of Doctor Trevor, who was Chancellor of a Biſhop in Wales, it was reſolved, that the Office of a Chancellor and Regiſter, &c. in the Eccleſiaſticall Courts, are within the Statute 5 Ed. 6. cap. 16. the words of which Statute are, Any Office, &c. which ſhall in any wiſe touch or concern the Adminiſtration or execution of Juſtice: and the words are ſtrongly penned againſt corruption of Officers, for they are, Which ſhall in any wiſe touch or concern the Adminiſtration, &c. And the Preamble; And for avoiding of corruption, which may hereafter happen to be in the Officers and Miniſters of thoſe Courts, Places, and Rooms, wherin there is requiſite to be had the true adminiſtration of Juſtice, in ſervices of truſt: And to the intent, that perſons worthy and meet to be advanced to the place where Juſtice is to be miniſtred, in any ſervice of truſt to be executed, ſhould be preferred to the ſame, and none other. Which Act being made for avoiding of corruption in Officers, &c. and for the advancement of perſons more worthy and ſufficient for to execute the ſaid Offices, by which Juſtice and Right ſhall be alſo advanced, ſhall be expounded moſt beneficially to ſuppreſſe Corruption. And inaſmuch as the Law allowes Eccleſiaſticall Courts to proceed in caſe of Blaſphemy, Hereſie, Schiſm, Incontinence, &c. and the loyalty of Matrimonies, of Divorce, of the right of Tythes, Probat of Wills, granting of Adminiſtrations, &c. And that from theſe proceedings depend not only the ſalvation of Souls, but alſo the ligitimation of Iſſues, &c. and that no debt or duty can be recovered by Executors or Adminiſtrators, without the probat of Teſtaments, or Letters of Adminiſtration, and other things of great conſequence; It is moſt reaſon that ſuch Officers, which concern the adminiſtration and execution of Juſtice in theſe points, which concern the ſalvation of Souls, and the other matters aforeſaid, ſhall be within this Statute, then Officers which concern the adminiſtration or execution of Juſtice in temporal matters; for this, that corruption of Officers in the ſaid Spiritual and Eccleſiaſticall Cauſes is more dangerous, then the Officers in temporall Cauſes; for the temporall Judge commits the party convict to the Goaler,

ler, but the Spirituall Judge commits the perſon excommunicate to the Devill. Alſo thoſe Officers do not only touch and concern the adminiſtration of Juſtice, &c. but alſo are ſervices of great truſt, for this, that the principall end of their proceedings is Pro ſalute animarum; &c. and there is no exception or proviſo in the ſtatute for them.

It was reſolved that ſuch Offices were within the Purview of the ſaid Statute.

Hil. 8. Jacobi Regis.

Admiralty.

IT is to be underſtood, that the Juriſdiction of the Admiralty is more ancient then Mr. Lambert in his Juriſdiction of Courts doth affirm, for there is held an opinion in theſe words concerning the Admiralty; I think that the deciſion of Marine Cauſes was not put out of the Kings houſe, & committed over to the charge of the Admiral, until the time of Ed. 3. whereunto I am led, partly by the conſideration of the time of his Raign, which was much occupied in affairs beyond the Seas, and by reaſon of his Wars with France, and of the intercourſe and trade of Marchandize, which then flouriſhed; and partly, for that I find no mention of the Admiralty before the Raign of R. 2. who going about by a Statute made the thirteenth yeer of his Raign, to reſtrain the authority of that Court which had exceeded her known limits, doth take order, that it ſhould meddle no more then it was wont to do in the time of his Grand-father Ed. 3. thereby reducing its authority, as I think, to the firſt Originall (hoc ille:) But without queſtion the Juriſdiction of the Admiralty is more ancient then the Raign of the ſaid King Ed. 3. for where it is ſaid, that there is found no mention of it before the time of Ed. 3. I find a notable Book in the time of Ed. 1. title Avowry 192. which proves the Juriſdiction of the Admiralty more ancient then Mr. Lambert ſuppoſeth: The Caſe was, One brought a Replevin of his Ship taken on the Coaſt of Scarborough, upon the Sea, and carried into the County of Norfolk, and there detained: the Plaint of taking in the Coaſt of S. which is no Town nor place certain by which the Paiſs may be taken; for the Coaſt contains foure Leagues. And alſo of a thing done at Sea, this Court cannot have Cognizances, for this Judgment is given to Marriners. Bereſford who gave the Rule in the caſe; The King wills that the Peace be kept as well upon the Sea as upon the Land: And we find that you come by due Proceſſe, and we ſee nothing why you ought not to anſwer, upon which Book I obſerve five things.

1. That of things done upon the Sea, certain judgment is given to Marriners, to eſt, to Admirals, as ſhall appear, and that doth not belong to the Court of the King, for this, that no paiſs may be taken there: And for this, that of a thing in any Town or place, where the paiſs or Jury may come, there the Admirall hath not juriſdiction.

2. This proves directly, that then the Admirall hath juriſdiction to adjudge things done upon the Sea, from whence no paiſs may come; And this did not begin then: But without queſtion, ſo long as there hath been Trade and Traffick (which is the life of every Iſland) there was Marin Juriſdiction to redreſſe Depredations, Piracies, Murthers, and other Offen-

ces

ces upon the Sea: And to determine all Contracts made there; And this doth appear by the ſaid Bereſford chief Juſtice (who ſpeaks in the voice of all the Court) where he ſaies, that the King willeth that the Peace be as well kept upon the Sea as upon the Land; and it is not poſſible that Peace ſhould be kept without juriſdiction of Juſtice.

3. The third thing to be obſerved is, that if part of the matter be done upon the Sea, and part in a County, that the Common Law ſhall have all the juriſdiction.

4. The Sea within the juriſdiction of the Admirall, is deſcribed to be out of every County, for if the Sea be within any County, then paſſ may come from thence, and the Admirall hath juriſdiction where the Common Law cannot give remedy.

5. If a thing be done upon the Sea, Vbi vel County, the party may plead it to the Juriſdiction of the Court: And all theſe Points are directly without any ſtrain collected out of the ſaid Book.

And it is to wit, that in ancient time the juriſdiction of the Admiral was called Maritina Angliæ, & ſometimes Marina Angliæ, & ſo the Vocabulum artis was made of an Adjective, as the office of Chamberlainſhip of Eng. was granted to the Earl of Oxford of ancient time, Per nomen Cameratiæ Angliæ, ſo that Maritina Angliæ, ſince Marina Angliæ, ſignifies the Admiralſhip, or Marinſhip of Eng. ſor Marinus, id. eſt quod θαλασσιος, that is, of the Sea, and θαλασσαρχος, is the Admirall or Generall of the Fleet; and Almarath, by Corruption Admirall, ſignifies the Governor or Captain of the Navy; and ſo Archigubernus ſignifies the Admiral or chief Governor of the Captains of the Navy, chief Captain of Mariners, Admirall of the Fleet, Admirall of the Ships, &c. ſunt ſynonima: And in ancient time, ſomtimes one was Admirall of all England, and ſomtimes the Office was divided: And for this Ex Rotulo Patentium de An: 6 H. 3. de Maritina Cuſtodienda, the Letters Patents are; Dominus Rex commiſit Galfrido de Lacy Maritinam Angliæ cuſtodiendum, quamdiu Dominus Rex placuerit, with commandment of that attendance, Ad fidem, comodum, & honorem Domini Regis. Teſte apud London, 29. Auguſti.

Ex Rotulo Patentium An: 9 H. 3. Rex omnibus de Coſtera maris Norf: & Suff: ſalutem. Sciatis quod conceſſimus Ricardo Agnillum Marinam Guardiam Norf: & Suf: cum omnibus pertinentijs, ſcil. Erewel, Oreford, Dunmervie, Gerem. & Lenn cuſtodiendam quamdiu nobis placuerit, & ideo vobis mandamus, quod ei in omnibus, quæ ad dictam Marinam pertinent, intendentes ſitis & reſpondentes. Teſte, &c. apud Weſt. 3. Octob. And Geffrey Lacy was called Admirall of England.

Charta 15. H. 3. 28. Junij, Petrus de Rivall habet ad totam vitam ſuam Cuſtodiam omnium Portuum & totius Coſteræ Marinæ Angliæ cum omnibus libertatibus & liberis conſuetudinibus prædict. Portuum & Coſteræ Maris pertinentibus, &c. 2. pars. Patent. 25 Ed. in 14 Clauſ. in Dorſo in 18 William Leybourne Capitanus Marinariorum.

At this time there were two Admirals; the one had the Government of all the Fleet from the mouth of Thames verſus Boream; the other from the mouth of Thames verſus occidentem 1. Pars Patent, 25 Ed. 1. 25. Martij in 9. Johannes Botetort Cuſtos Regis portuum Maritinorum verſus partes boreales, 1. Pars Patentium, 10 Ed. 2. 8 Dec. Nicolaus Kirrill conſtituitur Admirallus del Fleete, ſcil. omnium Navium ab ore aquæ Thamaſis verſus partes occidentales, 18. Aug. Et ibid. Tho: de Drayton Admirallus ab ore aquæ Thamaſis verſus partes Boreales.

And ſo in the time of R. 2, H. 4. H. 5. H. 6. during whoſe Raigns there was liketwiſe unus, qui fuit Admirallus Angliæ.

8 Ed.

8 Ed. 2. Coron. 399. Where a man may see that which was done of one part, and the other of the water, &c. in that place the County may have Cognizance, & it may be tryed by a Jury: which proves also, that that which may be tryed by the Common Law, doth not belong to the Admirals Jurisdiction; And Stamfords Pleas of the Crown, lib. 1. fol. 51. citing this Book, saies thus Viz. So this proves that by the Common Law, before the Statute, &c. the Admirall shall not have Jurisdiction, unlesse upon the high Sea, which proves that the Admirall by the Common Law hath Jurisdiction upon the high Sea, Ex quo sequitur, that his Jurisdiction was by the Common Law, and then it is so ancient, that the Commencement cannot be known, so that I do conclude, that his authority did not begin in the Raign of Ed. 3. as Monsieur Lambert, upon uncertain conjectures supposeth: For if the Jurisdiction had then began and been instituted, it would have appeared upon Record.

Pasch. 9 Jac. Regis.

IT was resolved by the two chief Justices, the chief Baron, the Attorney and Sollicitor, that the King may erect any name of Dignity, which was not before, and for that reason the King may create a Dignity, by name of Baronet, and create one to be a Baronet, to him and his Heirs Males of his body issuing.

It was resolved, that if he do not create him of some place, he shall not have an Estate-tail, but Fee simple conditionall, which shall be forfeited for Felony; but if he create him Baronet of a place, then he shall have an Estate-tail, within the Statute of West. 2. and the King may grant to him and the Heirs Males of his body, precedency before Knights Baronets, Knights of the Bath, and Knights Bachelors, and also may grant precedency to their Wives, Sons, and Daughters, &c. And that he cannot create any Dignity above the Dignity of a Baronet, and under the Dignity of a Baron: And that the creation of this Dignity of a Baronet, shall not discharge the Heir to be in Ward, as if the Heir be made a Knight, for he is not made Knight by this, for the Dignity of a Knight is not descendable.

Pasch. 9. Jac. Regis.

NOte, that in trespasse and Treason, the highest and the lowest offence, there are not any accessaries, but all are Principles: But in case of Felony, above the summ of 12 d there and in case of death, &c. there may accessaries, as well before as after; In case of petit Larceny there cannot be any accessory for the smalnesse of the felony: Then the Case is, That A. counterfeits the great Seal of England, and B. knowing, that he did counterfeit it, receives him, and abets and comforts him: All. is this case was guilty of the Treason, is the question. And it seems he is not, for although that A. by the counterfeiting be a Traytor, the receiving and comforting of him cannot make him an accessory, for that in case of high Treason there can be no accessory, and a Principall cannot be, for this,

that at the time of the counterfeiting he did not know of it; but if one before the Act done, procure one to counterfeit the great Seal, there it is high Treason; for in the Law he counterfeits the great Seal: And in the Indictment he may be charged with the Fact, viz. the counterfeiting, but so is not he who receives after the Fact, for he cannot be charged with the Fact: And in case of Trespasse, he who gives consent and aid to the Trespasse is a Principle in the Trespasse: And this as to me it appears is very apparent in treason, and agrees with our Books, as 19 H. 6. 47. b. he who is consenting and aiding to the making of false money, commits high Treason, for he is Particeps Criminis before the Fact done: but it is held in Conyers case, Mich. 13, & 14 Eliz. Dyer 296. that in the same case, if one after the act done, knows of the making of false money, and receives the party, this is not Treason, but misprision of Treason, for not making discovery; and with this accords 3 H. 7. 10. that it is not Treason, which diversity Stamfords Pleas of the Crown, fol. 3. hath not well observed, vide Dyer 298. vide 1e Stat. 27 Eliz. which made him who received a Jesuite a Felon, for by the judgment of the Parliament the receit of a Jesuite, although he be a Traitor is not Treason, for the Statute makes the returning of a Jesuite Treason, of which he who receives him cannot be indicted; but it is misprision for any who receives him and doth not discover, according to the resolution in Conyers case.

Pasch. 9 Jac. Regis.

Sir William Chanceys *Case.*

IN this very Term Sir William Chancey having the priviledge of this Court, and being Prisoner in the Fleet, was brought to the Bar by Habeas Corpus by the Gardian del Fleete, who returned, that the said Sir William was committed to the Fleet by force of a Warrant from the high Commissioners in Ecclesiasticall Causes, the Tenor of which Warrant followes in these words:

THese are to will and require you in his Majesties Name, by vertue of his high Commission for Causes Ecclesiasticall, under the great Seal of England, to us & others directed by force of a statute in such case provided, that herewithall you take and receive into your Custody the body of Sir William Chancey Knight, whom we will that you keep and detain under Custody, untill further order shall be taken for his enlargement, letting you know, that the cause of his Commitment is, for that being at the Suit of his Lady convented before his Highnesse Commissioners Ecclesiasticall, for Adultery, and for expelling her from his company, and Co habitation with another woman, without allowing her any competent maintenance, and by his own confession convicted therof; he was thereupon by order of Court enjoyned to allow his Wife a competent maintenance, according to his ability, and to perform such Submission and other order for his Adultery, as by Law should be enjoyned him, which expresly he refu-

sed

sed to do, in contempt of his Majesties said Authority to us on that behalf committed: Given at London 19 Martij 1611. subscribed,

London, Hen. Montague, Thomas Morton, George Owsley, Zacheus Cosfield.

And it was moved by Nicholas Serjeant a Councell with Sir William, that this return was insufficient, for two causes. 1. Because no time that Adultery ought to be punished by the Commissioners, and in fact made Defence, that it shall be punished by the High Commissioners, upon which the Defendant cannot have his appeal, or other remedy, as in the case of the Wife shall not sue there for Alimony. Quod fuit concessum per Coke, Warburton and Foster, but Walmsley contra. 2. That by force of the Act of that this was an Offence and matter [illegible] the said Sir William by 1 Eliz. the High Commissioners [illegible] Adultery, nay for bringing Children to his wife (if that was within their Jurisdiction) then although that the words of the Letters Patents gives them power to imprison the party, yet if the act doth not warrant them to imprison him. And Doderidge, Serjeant to the King, of Counsell on the other side, did not believe the imprisonment to be lawfull. And it was clearly agreed by Coke, Walmsley, Warburton, and Foster, that the Commissioners have not power to imprison him in this case; And Walmsley said, that although they have used by twenty years, to imprison in such case, without exception taken, yet when it came before them judicially, they ought to judge according to Law: And upon this Sir William Chancey was bailed; Also it was resolved Per totam Curiam, that when upon the return it doth appear, that the imprisonment is not lawfull, the Court may discharge him of imprisonment, but in this case, the Court thought fit rather to bail him, untill the next Term, and in the mean time to advise upon the Exceptions, and to see that which of them and reason they ought to be. Also it was resolved that the return was insufficient in form,

1. It is not shewn when the Adultery was committed.

2. He may not punish by fine and imprisonment, but only out any certainty; And to punish such Offenders and other after the his Adultery, as by the Law he shall be punished, and it is all in future, and uncertain what other they will take, and yet the cannot they imprison him; Also they make their warrant by force of a Commission to them and others directed, and do not say, as to any two or three, in that it may appear to the Court, that they who name the warrant had power by the Commission; also it is left in the warrant, that he was imprisoned by the Commission, also it is left to the discretion of the Court. Vide 21 my 4 Castle at large, the reasons and causes by the High Commissioners, (unless that it be in speciall cases) may not fine and imprison. Vide Pasch. 42 Eliz. Rot. 1209. Edw. Thickpenny case, he is imprisoned by the High Commissioners, and upon Habeas Corpus delivered by the Justices of the Common Pleas.

Paschæ

Pasch. 9 Jac. Regis.

Empringhams Case, Star-chamber.

IN this very Term a Bill was moved in the Star-chamber, upon a Bill exhibited by the Attorney general against Robert Empringham, Vice-Admirall in the County of York, Marmaduke Kettlewell, one of the Marshals of the Admiralty, and Thomas Clarkson, one of the Informers of the Court of Admiralty in the said County, and they were charged with oppression and extortion, that they had fined and imprisoned divers of the Kings Subjects in the County of York, which no Judge of the Admiralty can justifie, for that the Court is not a Court of Record, but the proceedings there are according to the Civill Law, and upon their sentence, appeal and no Writ of Error lyeth: Also the said Empringham hath caused divers to be cited to appear before him for things done in the body of the County, as for not repairing of the banks of a River, which is within the body of a County: Also for cutting of Trees upon his own soyl, and such like, which were peteminable by the Common Law, and not before the Admirall, for his authority is limitted to the high Sea, and out of any County: And for these and other Oppressions and Extortions they were by sentence of the Court of Star-chamber, fined, imprisoned, and award, that Restitution shall be made, &c.

Trin. 9 Jacobi Regis.

MEmorandum, that upon Thursday before the Term of holy Trinity, all the Justices of England were by the command of the King assembled in the Councell Chamber at Whitehall, where was also Abbot, Archbishop of Canterbury, and with him two Bishops and divers Civilians, where the Arch-bishop did complain of Prohibitions to the high Commissioners out of the Common pleas, and the delivery of persons committed by them by Habeas Corpus, and principally of Sir William Chancey, where I defended our proceedings, according to the Treatise which I made of it, and which I delivered before the high Commissioners. And after great disputation betwixt the Arch-bishop and me, at last the Arch-bishop said, that he had a point not yet touched upon in my Treatise, which would give satisfaction to the Lords, and to me also without question, upon which he would relye, and that was for cause of restitution and annexation, scil. And that all such Jurisdictions, Priviledges, Superiorities, and Preheminencies Spirituall and Ecclesiasticall, as by any Spirituall power or authority hath heretofore or hereafter lawfully may be exercised or used, for the visitation of the Ecclesiasticall State and persons, and for reformation, order, and correction of the same, and of all Errors, Heresies, Schisms, &c. shall for ever by authority of this present Parliament, be united and annexed to the imperiall Crown of this Realm: And it was said, that the Kings H. 8. and Ed. 6 give power by their Commissions under the great Seal to divers to impose Fines, &c. in Spirituall and Ecclesiasticall causes, &c. and upon this he concludes, that inasmuch as this had been used before 1 Eliz. this is given to Queen Eliz. and her Successors: Also inasmuch as by the Statute of 2 H. 4. and 2 H. 7. the Jurisdiction

diction Eccleſiaſticall may fine and impriſon in certain particular cauſes Eccleſiaſticall, for this cauſe Juriſdiction to fine and impriſon in all Eccleſiaſticall cauſes is given to the King: And this he ſaid he uttered to the intent that it may be anſwered; To which I for a time gave this anſwer, That it was good for the weal-publick, that the Judges of the Common Law ſhould interpret the Statutes, and acts of Parliament within this Realm; and that if ſuch interpretation ought to be made, was abſurd and againſt Law and reaſon for divers cauſes.

1. For that if ſuch word (lawfully) were omitted, that yet this Act, as appears by the Title and Preamble, being an act of Reſtitution, ought to be intended of lawfull Juriſdictions, Priviledges, &c.

2. Theſe words, Heretofore hath, or hereafter lawfully may be exerciſed, &c. This word lawfully extends as well to times paſt, as to times future: And all this was affirmed by all the Juſtices.

2. It was ſaid by me, that before the Statute of 1 Eliz. no Eccleſiaſticall Judge may impoſe a Fine or Impriſon for any Eccleſiaſticall or Spirituall Offence, unleſſe there be authority by act of Parliament: And this was ſo affirmed by all the Juſtices, that although in ſome caſes they may fine and impriſon, that by this clauſe in all caſes they may fine & impriſon, was ſo manifeſt, that it was not worthy any anſwer: But now I have ſeen the Commiſſion made to Cromwell to be Vice-gerent, and other Commiſſions to others by his appointment, for this, that he was imployed in the affairs of the Kingdom, in which Commiſſion are theſe words, Vide my Book of Preſidents, the Commiſſion at large.

And afterwards in this very Term the priby Council ſent for the Juſtices of the Common Pleas only, and there the reaſons and cauſes of the ſaid Reſolution were largely debated, and oppoſition was made as much as might be by Egerton Lord Chancellor, but the Juſtices of Common Pleas remained conſtant in their former opinion; and afterwards the Councill ſent for the chief Juſtices of the Kings Bench, Juſtice Williams, Juſtice Crook, Tanfield chief Baron, Snig, Altham, and Bromley, who were not acquainted with the reaſons and cauſes of the ſaid rule of the Common Pleas; nor did they know for what cauſe they came before the Councill, and hearing the Lord Chancellor affirm, that the high Commiſſioners have alwaies by act of 1 Eliz. impoſed Fines and Impriſonment for exorbitant Crimes (without any conference with us) were of a ſuddain opinion with us, without any conference amongſt themſelves, and without hearing of the matter debated: And after at another day this very Term, the ſaid Judges of the Kings Bench, Barons of the Exchequer, and Juſtice Fenner and Yelverton, who were omitted before, and We the Juſtices of the Common Pleas were commanded to attend the priby Councill; And when we all were aſſembled, We of the Common Pleas were commanded to retire, for that, as the Lord Treaſurer ſaid, we had conferred with the King, and in our abſence the King and the Prince ſate with the Councill, and then the Juſtices of the Kings Bench and Barons of the Exchequer, were ſeriatim with the Councill: And the King demanded their opinions in certain points concerning the high Commiſſion, with which they were not acquainted before, which were not related to us. In all which, as appears, after they were not unanimouſly agreed, and after two houres and a halfe, We the Juſtices of the Bench, Coke, Walmſley, Warberton, and Foſter, were commanded to come before the King, the Prince, and the Councill, where the King declared, that by the advice of his Councill, and by the advice of the Juſtices of the Kings Bench, and Barons, he will reform the high Commiſſion in divers points,

Coke ſent Letters, &c.

and reduced it to certain Spirituall Causes, the which after he will have to be obeyed in all points: And the Lord Treasurer said, that the principle feather was pluckt from the high Commissioners, and nothing but stumps remaining; and that they should not entermeddle with matters of instance, but of petit Crimes; And this word (Errors) being generall, shall be explained, and no Obligations shall be taken of the parties, as before absurdly and unjustly (as he said) had been taken, and divers other things were reformed, as he said, but he did not declare them in particular.

To which it was said by me to the King, that it was grievous to us his Justices of the Bench, to be so severed from our Brethren, the Justices and Barons, but more grievous that they differed from us in Opinion, without hearing one another: and especially forasmuch as we have proceeded in the case of Sir William Chancey, and other cases concerning the power of the high Commissioners in imposing of fines and Imprisonment judicially in open Court, upon argument at the Bar and the Bench, where it was resolved by us, that the high Commissioners cannot fine and imprison, but in certain cases; and the judiciall course ought to be judicially reversed: But I said to the King, that when we the Justices of Common Pleas see the Commission newly reformed, we will, as to that which is of right, seek to satisfie the Kings expectation; And so we departed without any demand of our Opinions.

Trin. 9 Iac. Regis.

Stockdales Case in the Court of Wards.

The King by his Letters Patents, dated 9. April, the ninth year of his Raign, granted, assigned and set over to William Stockdale, in these words.

Such and so many of the Debts, Duties, Arrerages, and summs of money, being of Record in our Court of Exchequer, Court of Wards and Liveries, Court of the Duchy of Lancaster, or within any other Court or Courts within this our Realm of England, or being of Record in any of our said Courts, &c. in any year, or severall years from the last year of the Raign of H. 8. untill the thirteenth year of our late dear Sister, as shall amount to the summ of a thousand pound, to have, take, levy, recover and enjoy the said Debts, Duties, Arrerages, and summs of money amounting unto the summ of a thousand pound, before in and by these presents given and granted to the said William Stockdale, his Executors, Administrators, and Assignes.

And in this case divers points were resolved.

1. That the said grant of the King is void for the incertainty, for by the Grant no Debt in certain may passe, and if it cannot passe by the Grant at the beginning, it shall never passe as this case is: As if the King hath a hundred acres of Land in D. and he grants to a man twenty acres of the Lands in D. without any describing of them by the Rent, or Occupation, or name, &c. this Grant is void, and in the case of the King, the Patentee shall not have his election, as he shall in the case of a common person; but in case of the King, if the twenty acres are described, or by abuttals, or by

by name certain in the particular, this is good demonstration which twenty acres shall passe.

2. Where the Patentee claimes by force of this word Arrearagia, to have arrerages of Rents, Reliefs, and mean Rates of Lands, &c. in the Court of Wards, &c.

It was resolved clearly, that he shall not have them, if the Patent had not gone further; for inasmuch as this word Arrearages is coupled with these words, Debts, Duties, and with these words subsequent (summs of money) it shall be intended of arrearages of things personall, and not of things reall; as of arrearages of accompt of moneys delivered in Exch. &c.

But the Proviso in the end of the Patent, viz. Provided alwaies, that the said William Stockdale shall take no benefit by any means of arrearages of any Rents, Reliefs, Heriots, or annuall payments whatsoever, untill Sir Patrick Murrey and others be fulfilled and paid the summ of 10000 l. &c. hath well explained what arrearages the King intended, viz. of Rents, &c. and so to construe one part of the Patent by the other; But clearly mean Rates are not within the said words, for they are the profits of demesn Land.

Trin 9 Jac. Regis.

Man-slaughter

Divers men playing at Bowls at great Marlow in the County of Kent, two of them fell out, and quarrelled the one with the other, and a third man who had not any quarrel, in revenge of his friend, struck the other with a Bowl, of which blow he died; This was held Man-slaughter, for this, that it hapned upon a sudain motion in revenge of his friend.

In the very same Term a speciall Verdict, being divers years past found in the County of Hertford, the effect of which; That two Boyes combating together, the one of them was scratched in the face, and his Nose voided a great quantity of blood, and he so run three quarters of a mile to his Father, who seeing his Son so abused, and the blood run from him, and his cloaths and face all bloody, he took in his hand a Cudgell, and went three quarters of a mile to the place where the other Boy was, and struck him upon the head, upon which he died. And this was held but Man-slaughter, for the ire and passion of the Father was continued, and there was no time that the Law can determine that it was so setled, that it shall be adjudged in Law, Malice prepensé, and this case was moved ad thensam, &c.

Mich.

Mich. 9 Jac. Regis.

High Commission.

MEmorandum, that upon Thursday in this Term, a high Commission in Causes Ecclesiasticall was published in the great Chamber of the Arch-bishop at Lambeth, in which I with the chief Justice, chief Baron, Justice Williams, Justice Crook, Baron Altham, and Baron Bromley were named Commissioners, amongst all the Lords of the Councill, divers Bishops, Attorney, and Sollicitor, and divers Deans and Doctors of the Cannon and Civill Lawes; and I was commanded to sit by force of the said Commission, which I refused for three causes.

Great Objections against Arch-bishop.

1. For this, that I, nor any of my Brethren of the Common Pleas, were acquainted with the Commission, but the Judges of the Kings Bench were.

2. That I did not know what was contained in the new Commission, and no Judge can execute any Commission with a good conscience without knowledge; and that alwaies the gravity of the Judges hath been to know their Commission, for Tantum sibi est permissum, quantum commissum: And if the Commission be against Law, they ought not to sit by vertue of it.

3. That there was not any necessity that I should sit, who understand nothing of it, so long as the other Judges were there, the advice of whom had been had in this new Commission.

4. That I have endeavoured to inform my self of it, and have sent to the Rolls to have a Copy of it, but it was not enrolled.

5. None can sit by force of any Commission, untill he have took the Oath of Supremacy, according to the Statute 1 Eliz. And for this, if they will read the Commission so that we may hear it, and have a Copy to advise upon it, then I will either sit or shew cause to the contrary. But the Lord Treasurer would for divers reasons perswade me to sit, which I utterly denied.

And to this the chief Justice, chief Baron, and some others of the Judges seemed to incline, upon which the Lord Treasurer conferred in private with the Arch-bishop Bancroft, who said to him, that he had appointed divers causes of Heresie, Incest, and enormous Crimes to be heard upon this day, and for that he would proceed; but at last he was content that the Commission should be solemnly read, and so it was, which contained three great Skins of Parchment, and contained divers points against the Laws and Statutes of England: And when this was read all the Judges rejoyced that they did not sit by force of it: And then the Lords of the Councill, Viz. The Arch-bishop, the Lord Treasurer, the Lord privy Seal, the Lord Admirall, the Lord Chamberlain, the Earl of Shrewsbury, the Earl of Worcester, with the Bishops, took the Oath of Supremacy and Alleageance, and then we as Commissioners were required to take the Oath, which I refused untill I had considered of it: But as the Subject of the King, I and the other Judges also took the Oath of Supremacy and Alleageance.

Then the Lord Arch-bishop made an Oration in commendation of the care and providence of the King for the peace and quiet of the Church; Also he commended the Commissioners, also the necessity of the Commission to proceed summarily in these daies, wherin sins of detestable nature, and Factions, and Schisms did abound, and protested to proceed sincerely by force

force of it, and then he cauſed to be called a moſt blaſphemous Heretick, and after him another, who was brought thither by his appointment, to ſhew to the Lords and the Auditory the neceſſity of that Commiſſion.

And after the Arch-biſhop came to the chief Juſtice and to me, and promiſed us that we ſhould have a Copy of the Commiſſion, and then I ſhould obſerve the diverſity between the old Commiſſion and this; and all the time that the long Commiſſion was in reading, the Oath in taking, and the Oration made, I ſtood and would not ſit, as I was requeſted by the Arch-biſhop and the Lords, and ſo by my example did all the reſt of the Juſtices.

And the Arch-biſhop ſaid, that the King had commanded him to ſit by vertue of this new Commiſſion, in ſome open place, and at certain dates: And for that cauſe he had appointed the great Chamber at Lambeth in Winter, and the Hall in the Summer; and every Thurſday in the Term time, at two of the Clock in the after-noon, and in the fore noon, he would have a Sermon for the better informing of the Commiſſioners of their duty, in the true and ſincere execution of their duties.

Mich. 9. Jacobi Regis.

IN this ſame Term the Iſſue in an Information upon the Statute 2 H. 6. 15. was tryed at the Bar, and upon the evidence upon the words of the ſaid Act, which are, that every perſon which ſetteth or faſtneth in the River of Thames, any Nets or Engines called Trincks, or any manner of Nets, to any Poſts, Boats, Anchors, or the like thing, to ſtand continually day and night, forfeiteth to the King a hundred ſhillings, for every time, &c. and the Defendants having ſet and faſtned Nets called Trincks, in the River of Thames, &c. to Boats day and night, for ſo long time as the Tyde did ſerve, and not continually.

The queſtion was, if this was within the Statute; and it was clearly reſolved, that it was within the Statute, for the Nets called Trincks, cannot ſtand, but for ſo long as the Tyde ſerves: And for this, the word Continually ſhall be taken continually ſo long as they may ſtand to take Fiſh, and as the time of fiſhing endures, be it in the day or night, for Lex non intendit aliquid impoſſibile, for otherwiſe the Law ſhould not be of any effect: And although that it was ſaid, that this Statute remains in force, and if any had complained of any offence againſt it, he ſhall be puniſhed, but the reaſon for why no execution hath been made of this Act, was for this, that none ſhall have benefit by the ſuit but the King only, for the penalty is only given to the King; And as it doth appear by the Preamble, and in the Proviſo in the Act, the manner of the Nets was not the cauſe of the making of the Act, for by the Proviſo every man may fiſh in his ſeaſonable time with Trincks, if they are of Aſſiſe, drawing and conveying them with their hands, as other Fiſhers do, and not faſtning them to Poſts, Boats, or Anchors, &c. continually to ſtand; for the miſchief was, by faſtning them, and the ſtanding of them continually, the brood and fry of Fiſh were deſtroyed, and diſturbance made to common paſſage of Veſſels, as Weers, Rivels, and other Engines.

Mich. 9 Jac. Regis.

Shulters Caſe in the Star Chamber.

IN Camera Stell. the Caſe was ſuch; John Shulter of Wisbich of the age of 115. years, had Iſſue John his eldeſt Son, and others, Viz. Chriſtopher, Richard, &c. and being ſeiſed of Lands in Fee of the value of a hundred marks per annum, his eldeſt Son being dead, and his Grand-child John being within age, he intended, and ſo gave direction to make a Leaſe of a Farm called Rouſhall to Chriſtopher during the minority of his Grand-child, rendring the ancient Rent, with power of Revocation: and of Lands in Patsbury to the ſaid Richard in the ſame manner, and for the ſame time: and Chriſtopher and Richard by the Covin and aide of one Woodroof a Scrivener, 24 Eliz. drew and ingroſſed two ſeverall Leaſes of the Premiſſes ſeverally to Chriſtopher and Richard for one and fifty years, rendring but four pence per annum, and without any power of Revocation: And John Shulter the Grand-father could read and write very well, but by reaſon of his great age was blind; and Woodroof declared to him, that the effect of the ſaid Leaſes were in all points according to his direction: And upon this the ſaid John Shulter the Grand-father ſealed and delivered as his Deeds.

And it was reſolved by the Lord Eleſmere Chancellor, and the two chief Juſtices, that the ſaid Indentures could not bind the ſaid John Shulter, for this, that he was blind, and like to one who could not read at all; and that the effect being declared unto him in other manner then in truth the Indentures were. It did fully agree with Manſers Caſe in the ſecond part of my Reports, fol. 4.

Mich. 9 Jac. Regis.

Sir Anthony Aſhleys Caſe.

Conſpiracy.

BEtween Sir Anthony Aſhley Knight, Plaintiff, and Sir James Creighton, Knight, Hercules Hannings, John Cantrell Servant of Hannings, Thomas Hampton, Archibald Sterling, Servants to Sir James Creighton, Henry Smith, Mary Rice, and divers others Defendants, the Caſe was thus:

Sir James Creighton had bought a pretended right of and in the Manor of Lyddy and Willitent, and divers other Lands of which Sir Anthony had long poſſeſſion, upon which divers motions were made concerning Fines acknowledged to be ſtaid, &c. in the Common Bench, and Sir James Creighton not prevailing in it, and Sir Anthony (for divers miſdemeanors only, heard before the Lords of the Council, at the Council Table, being diſcharged to be one of the Clerks of the Councill and in great diſgrace) he entered into a wicked and damnable Conſpiracy with the other

ther Defendants, to accuſe the ſaid Sir Anthony of ſome hainous and capitall Crime, by which he ſhould forfeit all his Land to the value of two thouſand marks per annum, and his Goods and Chattels to a great value, which they ſhould ſhare amongſt them: And in the end, Henry Smith, who had been the Servant of Sir Anthony was ſuborned by the ſaid Sir James, and others to accuſe the ſaid Sir Anthony, of the Murther of one William Rice, who was the Husband of the ſaid Mary Rice, one of the Defendants, which William Rice was dead above eighteen years before, upon furmiſe made by Sir James Creighton, that after the Attainder of Sir Anthony Aſhley, Smith ſhould have a Portion of five hundred pounds in money; and that Sir James ſhould procure of his Uncle, the Captain of the Guard, a place of the Guard in Ordinary, and procure the King to grant protection to the ſaid Smith againſt his Creditors, and a generall pardon of all Offences, but he would not make any accuſation of the ſaid Sir Anthony untill he had aſſurance of it; And upon this, Articles by writing Indented were drawn and ingroſſed by one Thomas Wood a Scrivener, who dwelt in an obſcure place about the Tower, made between Sir James Creighton of the one part, and the ſaid John Cantrell, Servant to Hunnings, by the conſent of Smith, and to his uſe, on the other part, by which Sir James covenanted, that the ſaid John Cantrell and his Heirs after the conviction and attainder of Sir Anthony Aſhley, ſhall have the ſixth part of his Mannors, Lands, Tenements, and Hereditaments, Goods and Chattels in ſix parts to be divided, in conſideration that Cantrell covenanted, &c. that he ſhould procure witneſſes to convict the Plaintiff of Murther, or other Capitall Crime, and to deliver to Sir James Creighton a true particular of all the Lands, Goods, and Chattels of Sir Anthony, which Articles were ſealed and delivered by Sir James Creighton, 16. Feb. An. 7. Jac. And at the ſame time he was bound to Cantrell in an Obligation of eight thouſand pound for performance of the ſaid Articles, and after within two daies after the ſaid Articles were ſealed and delivered, Henry Smith counterfeited himſelf to be ſick, and then he revealed the ſaid Murther in diſcharge, as he pretended, of his conſcience, and accuſed himſelf of poyſoning of the ſaid William Rice, by the commandment of the ſaid Sir Anthony Aſhley, ſo that he himſelf was the Principle; And upon this Sir James Creighton procured the ſaid Mary Rice, late the Wife of the ſaid William Rice, to prefer a Petition to the King, importing the accuſation aforeſaid; the King referred the Petition to the chief Juſtice of the Kings Bench, to examine the cauſe and the Witneſſes on both ſides, the which he did, and certified the King that he had found a falſe Conſpiracy, to indict Sir Anthony without any juſt ground; and certified alſo the effect of the ſaid Articles, upon which the King after conference with his privy Councel, and by their advice thought the matter neceſſary to be heard and ſentenced in the Star Chamber, the which matter upon ordinary proceedings was heard by ſix daies in the very ſame Term: And it was objected by the Councel of the Defendants, that the Bill upon the ſaid Conſpiracy did not lye, and that it ſhould be dangerous to maintain it, for if it ſhould be lawfull for every one who is accuſed, or was in fear to be accuſed of any capitall Crime, to exhibite his Bill in this Court againſt the Accuſer and all the Witneſſes, and by many captious and intricate Interrogatories ſeverally to examine them to find contrariety in them in circumſtances; This will deter men to proſecute againſt great Offenders, and thence great Offences will paſſe unpuniſhed, which will be dangerous to the Weal publick, and by the Law Conſpiracy lies when a man is indicted, and *Legitimo modo acquietus*, but here he was never indicted, and

for

for that it may be, that Sir Anthony is guilty of the ſaid Crime, and then are all mouthes ſtopped to ſay the contrary.

But to that it was anſwered and reſolved by the Lord Chancellor, the two chief Juſtices, and all the Court, that in this caſe the Bill was maintainable, although that the party accuſed was not indicted and acquitted before, as it was reſolved in this Court, Hil. 8 Jac. in Poulters caſe, and for the reaſons and cautions there expreſſed; Alſo in this caſe at the Bar, be Sir Anthony guilty or not guilty of the ſaid Murther, yet the Defendants are puniſhable for the great and hainous miſdemeanor and conſpiracy, ſcil. for promiſing of the ſaid Bribes and Rewards to ſubborn the ſaid Henry Smith to accuſe the Plaintiff of the ſaid Murther eighteen yeers paſſed, and the Articles in writting to ſhare and divide the Eſtate of Sir Anthony after the Attainder; for this corrupt Conſpiracy, and great and perilous practiſe and miſdemeanor, the Defendants ſhall be puniſhed, let Sir Anthony be guilty or not of the ſaid Crime. And it is a great indignity offered to the King for any Subject to preſume to covenant or aſſume, that the King ſhall grant protection or pardon, or that the Eſtate of any man ſhall be ſhared and divided before his Attainder.

So that although that the Court will not enter into the examination of the Crime, yet it appears by the Teſtimony of a great number of Witneſſes, that the ſaid William Rice did not dye of any poyſoning, but of another horrible diſeaſe, that he had got by his wicked and diſſolute life, which with reverence cannot be ſpoken. Le grand Pox.

And in this caſe it was reſolved, that if Felony be done, and one hath ſuſpition upon probable matter that another is guilty of it, becauſe that he had part of the Goods robbed, and is indigent, or of evill fame; or if the party be indicted, or if Murther be committed, and one is ſeen neer the place, or comming with a Sword or other Weapon embrued with blood, or that he was in company of Felons, or hath carried the Goods ſtoln to obſcure places, or ſuch like things, theſe are good cauſes of ſuſpition, and by reaſon of this he may arreſt the party ſo ſuſpected, to the end that he may ſubject him to Juſtice.

But in this caſe three things are to be obſerved.

1. That a Felony be done.

2. That he who doth arreſt, hath ſuſpition upon probable cauſe, which may be pleaded and is traverſable.

3. That he himſelf who hath the ſuſpition arreſt the party.

For he cannot command another to do it, for ſuſpition is a thing individuall and perſonall, and cannot extend to another perſon then to him who hath it.

Alſo it was reſolved, that if Felony be done, and the common fame and voice is that one hath committed it, this is good cauſe for him who knows of it to arreſt the party, to the intent that he may be brought to Juſtice, but none can arreſt the party ſuſpected by the command of him who hath the ſuſpition, and with this agrees the Book in 2 H. 7. 15, 16. 15 H. 7. 5. 20 H. 7. 12. 21 H. 7. 28. 7 Ed. 4. 20. 8 Ed. 4. 27. 11 Ed. 4. 4 6. 17 Ed. 4. 5, 6. 20 Ed. 4. 6. b. 7 H. 4. 25. 27 H. 8. 23. 26 H. 8. 9. 7 Eliz. Dy. 226.

Mich.

Hil. 9 Iac. Regis.

IN this very Term, the Attorney and Sollicitor consulted with me, if at this day upon conviction of an Heretick before the Ordinary, this Writ De Heretico comburendo lyeth; and it seems to be cleerly that it doth not, for the reasons and authorities that I have reported, Trin 9 Jac. fol. 73. And after they consulted with Fleming chief Justice, Tanfield, chief Baron, Williams, and Crook; and they upon the report of Doctor Cosins, mentioned in my said Report, and upon certain Presidents which passed in the time of Queen Elizabeth, upon former Presidents, although the Statute of 2 H. 4. was enforced, and without consideration (as I have heard) of the Authorities cited by me in my said Report; they certified the King, that a Writ De Heretico comburendo lyeth upon a conviction before the Ordinary, but that the most convenient and sure way was to convict the Heretick before the high Commissioners.

Breve de Heretico comburendo, *lyeth not at this day*, &c.

Pasch. 10 Jac..

The Lord Vaux his Case.

IN this Term, the Lord Vaux was indicted of a Premunire in the Kings Bench upon the new Statute, for refusing the Oath of Alleageance, and upon this he was arraigned, and prayed that he might be tryed Per pares.

But it was resolved, that he shall not in this case be tryed by his Peers, for the Statute of Magna Charta, cap. 29. Nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, is only to be understood of Treason, Misprision of Treason, petit Treason, and Felony, and of Accessories to them, &c. But Premunire is but a Contempt, and Pardon of all Contempts pardons it; and for this cause it shall not be Per pares.

And upon this the Lord Vaux did confesse the Indictment, vide Lamb. Inst. del pace 520. Dallisons Report accordingly: That of Riots, Routs, unlawfull Assemblies, &c. A Peer of the Realm shall not be tryed Per pares, vide Stamford, &c.

Trin. 10 Jac.

Counteſſe of Shrevvsburies Caſe.

Contempt.

IN this Term, before a ſelect Council at York Houſe, Scil. The Lord Chancellor, the Arch-biſhop, the Duke of Lenox, the Earl of Northampton, Lord privy Seal, the Earl of Suffolk, Lord Chamberlain, the Earl of Worceſter, the Earl of Pembroke, Viſcount Erskin, Viſcount Rochford, the Lord Zouch, the Lord Knolls, the Lord Wooton, the Chancellor of the Exchequer, the Chancellor of the Dutchy, Fleming chief Juſtice of the Kings Bench, Philips Maſter of the Rolls, Coke chief Juſtice of the Common Pleas, and Tanfield chief Baron.

The Counteſſe of Shrewsbury (the Wife of Gilbert, Earl of Shrewſbury) then Priſoner in the Tower was brought before the ſaid Lords, and by the Attorney and Sollicitor of the King, was charged with a high and great Contempt of dangerous conſequence; for they declared that the Lady Arbella being of the Blood-royall, had married Seymer, ſecond Son of the Earl of Hertford, without privity or aſſent of the King, for which Contempt the ſaid Seymer was committed to the Tower, and had eſcaped and fled beyond the Seas; the Lady Arbella being under reſtraint eſcaped alſo, and Embarqued her ſelf upon the Sea, and was taken before ſhe got over; of which flight of the ſaid Lady Arbella, the ſaid Counteſſe being her Aunt, very well knew and abetted, as is directly proved by Crompton, and not denied by the Lady Arbella: And admit it, that the Lady Arbella had no evill intent againſt the King (who had always a great and ſpeciall care of her, and was very bountifull unto her untill her marriage with the ſaid Seymer, which was the Pomum veritum) yet when ſhe fled, and when ſhe ſhould be inviroued with evill Spirits, Cum perverſis perverti poſſit, and when ſhe ſhall be in another Sphere, ſhe will move with the ſame Orb.

And the Lords of the privy Council knowing the Arcana imperij, did ſhew divers perilous conſequences, and the rather for this, that the ſaid Counteſſe is an obſtinate Popiſh Recuſant, and as was ſaid, perverted alſo the Lady Arbella.

Now the Charge was in two points.

1. That the ſaid Counteſſe of Shrewsbury, by commandment of the King, being called to the Council Table, before the Lords of the Council at Whitehall, and there being required by the Lords to declare her knowledge touching the ſaid points, and to diſcover what ſhe knew concerning them, for the ſafety of the King and quiet of the Realm, ſhe anſwered, that ſhe would not make any particular anſwer; And being again asked by the Kings command, by the Council at Lambeth, and being charged again to anſwer to the ſaid points, ſhe refuſed, for two cauſes.

1. For that ſhe had made a raſh Vow, that ſhe would not declare any thing in particular touching the ſaid points; and for that (as ſhe ſaid) it was better to obey God then Man.

2. She

2. She stood upon her priviledge of Nobility, scil. To answer only when she was called judicially before her Peers, for that such priviledge was allowed (as she said) to William Earl of Pembroke, and to the Lord Lumley.

2. The second point of her Charge was, that when such answer which she had made was put in writing, and read to her, yet she refused to subscribe to it, which denial to discover and discharge her Conscience in a case which toucheth the safety of the King and quiet of the Realm, was adjudged by the Kings Council to be a great and high Contempt, and that Nobility hath not any such priviledge as is alledged, nor any such allowance as was supposed; and that rash and illegall Words make not an excuse, and that this President being put upon the Stage, was of very dangerous consequence: And the said Countesse hearing the Charge, yet persisted in her obstinate refusall, for the same reasons and causes upon which she had insisted before: And the Lord Chancellor began, and the Archbishop, and all the other Lords began with the first, and adjudged it a great and high contempt; and the Lord Chancellor said, that that was against the Law of England, with which all the Lords agreed.

And that no such allowance was given to the said Earl of Pembroke, or to the Lord Lumley in respect of their priviledge of Nobility, but that they were Voces populi, & ideo non audiendæ: And the Lord Archbishop principally proved, that as well the Contempt, as the said rash Word was against the Law of God, which he and the Earl of Northampton principally proved by divers Texts and Examples in holy Scripture.

And the effect of all that which the three Justices said, was, that after the Sentences of all the learned, prudent, and honourable Personages and Councellors of Estate, they might well be silent; but in regard that Silentium in Senatu est vitium, they would speak something briefly, Viz.

That three things in this case are to be well considered.

1. Whether the refusals aforesaid of the said Countesse were Offences in Law against the King, his Crown and Dignity.

2. What manner of proceeding this is; and whether it was justifiable by President or Reason.

3. What is the demerit of the Offences, and how punishable.

As to the first it was resolved by the Justices and Master of the Rolls, that the denying to be examined was a high and a great contempt in Law, against the King, his Crown and Dignity; and that if it should be permitted, it would be an occasion of many high and dangerous designs against the King and the Realm, which cannot be discovered: And upon hope of Impunity it will be an encouragement to Offenders, as Flemming Justice said, to enterprise dangerous attempts.

And the Master of the Rolls said, that it was not any priviledge of Nobility to refuse to be examined in this case, no more then to any other Subject.

Also, if one that is Noble, and a Peer of the Realm, be sued in the Star Chamber, or in Chancery, they ought to answer upon their Oathes, and may be examined in the Star Chamber upon Interrogatories upon their Oathes: And if one who is Noble be produced as a Witnesse between party and party, he ought to be sworn, or otherwise his testimony is of no value; and so is the common experience in the said Courts: And the chief Justice said, that forasmuch as where order is neglected, confusion will follow, he would recite some of the honourable Priviledges which the Law of England (more then any other Law) attribute to the Nobility

lity of England in legall proceedings; and they will not be impertinent, but give a great light to the caſe now in hand.

1. If a Baron, Viſcount, Earl, or other Lord of Parliament and Peer of the Realm be Plaintiff in any action, and the Defendant will plead that the Plaintiff is not a Baron, Viſcount, Earl, &c. as he is named in the Writ, this ſhall not be tried at the Common Law by Jury, who may be corrupted, nor by Witneſſes, as in the Star Chamber, or Chancery, who may be ſuborned; but it ſhall be tried by the Record in Chancery, which imports by it ſelf ſolid truth: ſo great regard hath the Law to the triall of their Honour and Dignity, &c.

2. Their perſons have many honourable Priviledges in Law.

1. At the Suit of a Subject their bodies ſhall not be arreſted, neither Capias nor Exigent lyeth againſt them.

2. For the honour and reverence which the Law gives to Nobility, their bodies are not ſubject to torture *in Cauſa criminis Laſe Majeſtatis.*

3. They are not to be ſworn in Aſſiſes, Juries, or other Inqueſts.

4. If any Servant of the King, named in the Cheque Roll, compaſſe or intend to kill any Lord of Parliament, or other Lord of the Kings Council, this is Felony.

5. In the Common Pleas, a Lord of Parliament ſhall have Knights returned on his Jury.

6. He ſhall have day of Grace.

7. A Lord of Parliament ſhall not be tryed in caſe of Treaſon, Felony, or Miſpriſion of them, but by thoſe who are Noble and Peers of the Realm.

8. In tryall of a Peer, the Lords of Parliament ſhall not ſwear, but they give thier Judgment *Super fidem & ligeantiam Domino Regi debitam*, ſo that their faith and alleageance ſtands in equipage with an Oath in the caſe of a common perſon in tryall of life: And the Writs of Parliament directed to the Lords of Parliament, are *Sub fide & ligeantia &c.* And the reaſon and cauſe that the King gives them many other Priviledges is for this, becauſe all Honour and Nobility is derived from the King as the true Fountain: And the King honours with Nobility for two cauſes.

1. *Ad conſulendum*, and for that reaſon he gives them a Robe.

2. *Ad defendendum Regem & Regnum*, and for that cauſe he gives them a Sword.

And forasmuch as they derive their Dignities accompanied with all thoſe Honourable Priviledges from the King, to deny to anſwer, being required therto by the King, to ſuch points as concernes the ſafety of the King and quiet of the Realm, is a high Contempt and diſobedience, accompanied with great ingratitude.

This

This denial is contra Ligeantiam ſuam debitam, againſt the faith and alleageance of a perſon Noble, due to the King, and which the Law greatly eſteems.

And that this denying is againſt her faith and alleageance, appears by the ancient Oath of Alleageance, which is imprinted in the heart of every Subject, Scil. Ero verus & fidelis, & veritatem preſtabo Domino Regi de vita & membro & de terreno honore, & vivendum & moriendum contra omnes gentes, &c. Et ſi cognoſcam aut audiam de aliquo damno aut malo quod Domino Regi evenire poterit, quod non revelabo, &c. And this Oath of Alleageance is common to all Subjects, as well thoſe of the Nobility as Commonalty: But the Law hath greater account to the Faith and Alleageance of a Noble man, then of one of the Commons, for this, that the breach of their alleageance is more dangerous to the King and Eſtate, for Corruptio optimorum eſt peſſima; and for this reaſon the Counteſſe by her alleageance was bound, without being demanded, to reveal to the King what ſhe knows concerning the Premiſſes, upon which great miſchief may happen to the King and the Realm; But being commanded by the King to declare her knowledge, the denying of it doth greatly aggravate the Offence.

Qui contemnit præceptum, contemnit præcipientem.

Command and obedience are the ligament of Government, and Ligeantia eſt Legis eſſentia, for without alleageance and obedience the Law cannot proceed.

As to the ſecond point, Viz. concerning the manner of this proceeding.

1. Privative, it is not to fine and impriſon, or inflict corporall puniſhment upon the Counteſſe, for fine and impriſonment ought to be aſſeſſed in ſome Court judicially. *Vide* the Earl of *Eſſex* Caſe, 42, & 43 *Eliz.* 414.

2. Poſitive, the Fine is Ad monendum, or at the moſt Ad minandum, it is ad inſtruendum, non ad deſtruendum.

This ſelected Councel is to expreſſe what puniſhment this Offence juſtly deſerved, if it be judicially proceeded within the Star Chamber, for which reaſon this manner of proceeding is out of the mercy and grace of the King againſt this honourable Lady, that ſhe ſeeing her Offence may ſubmit her ſelf to the King without any puniſhment in any Court judicially.

If Sentence ſhall be given in the Star Chamber according to Juſtice, yea the Lords ſhall be Agents in it; But in this manner according to the mercy of the King, the King is only Agent, the Law hath put Rules and Limits to the Juſtice of the King, but not unto his Mercy, that is tranſcendent and without any limits of the Law; Et ideo proceſſus iſte eſt regalis plane & rege dignus.

Alſo inaſmuch as the alleageance and obedience of the Subject, is the beſt Flower in his Imperiall Garland, to the intent, that it may neither be blaſted, nor impaired by this dangerous example, to the prejudice of his Royall Prerogative and Poſterity, this proceeding hath been thought neceſſary: And this is fortified by the Preſident of the Earl of Eſſex, againſt whom ſuch proceedings were in this very place, An. 42. & 43. Eliz. Reg.

And as to the laſt point it was reſolved by all Quaſi una voce, that if a Sentence ſhould be given in the Star Chamber judicially, ſhe ſhould be fined twenty thouſand pound, and impriſoned during the Kings pleaſure.

Trin. 10. Jacobi Regis.

Robert Scarlets Caſe.

NOte, that at the Seſſions of the Peace held lately at Woodbridge in the County of Suffolk, the Sheriff returned a grand Inqueſt, of which one Robert Scarlet, in the County of Suffolk, had requeſted to be one, but the Sheriff, knowing the malice of the man, refuſed to return him; but notwithſtanding by Confederacy with the Clerk who read the Pannel, he was ſworn of the Grand Inqueſt, and was not returned by the Sheriff; and being amongſt them of the Grand Inqueſt, and as one of them, of his malice, and upon his own knowledge, as he pretended (to whom the reſt gave credit) indicted ſeventeen honeſt men, upon divers penall Laws; and ſome of the Juſtices looking over the Bills, found by the Grand Inqueſt, and perceiving ſo many honeſt men to be indicted, as they did think, maliciouſly, demanded of them of the Inqueſt, what evidence they had to find the ſaid Bills, and they anſwered, by the Teſtimony and Cognizance of one of themſelves, ſcil. of Robert Scarlet: And upon examination it did appear, that the ſaid Robert Scarlet was not returned, but that he by confederacy betwixt him and the Clerk, procured himſelf to be ſworn of the ſaid Grand Inqueſt, with intent to indict his Neighbours maliciouſly, for which offence he was indicted at Summer Aſſiſes, An. 10 Jac. held at Bury, upon the Statute 11 H. 4. cap. 9. by which it is provided, that no Indictment ſhall be found by any perſons named to the Juſtices, without due return of the Sheriff, but by inqueſt of lawfull Liege people of the King, in ſuch manner as was uſed in the time of his Noble Progenitors, returned by the Sheriff, &c. without any denomination, &c: And if any Indictment be made hereafter in any point contrary, that the Indictment ſhall be void, and for ever held Nul.

And upon this Act of 11 H. 4. the ſaid Robert Scarlet was indicted, and he pleaded not guilty: And all the eſpeciall matter aforeſaid was proved in evidence; and upon this he was found guilty by a ſubſtantiall Jury: And in this caſe conſideration was had of divers points.

1. Whether the Juſtices of Aſſiſe have power to puniſh this Offence, or no; and it was held affirmatively, ſcil. by force of their Commiſſion of Oyer and Terminer, for that the ſaid Commiſſion gives them power Ad inquirendum inter alia de omnibus falſitatibus, negligentiis, &c. & aliis malefactis, offenſis & injurijs quibuſcunque, and of them to heare and determine; and this is underſtood as well of offences againſt an Act of Parliament, as againſt the Common Law; And for that that it is commonly uſed, that Indictments of non-reſidency of Parſons, Vicars, &c. upon the Statute of 21 H. 8. are taken before the Juſtices of Aſſiſe, by force of this word in the ſaid Commiſſion of Oyer and Terminer, Viz. Negligentijs, &c. ſo that if the Act be indefinite or generall, and doth not give Juriſdiction to any certain Courts in ſpeciall (for then the Act is to be purſued) the generall words of the Commiſſion of Oyer and Terminer extends to it: And it was well obſerved, that in the Commiſſion of the Peace, the ſaid generall words, ſcil. De omnibus & ſingulis alijs malefactis & offenſis have a qualification, ſcil. de quibus Juſtitiarij de pace legitime inquirere poſſint aut debent, which limitation proves the

the large extent of the words, when they ſtand without any qualification.

Vide 7 Eliz. Dyer, Commiſſioners of Oyer and Terminer may enquire of Offences againſt penal Statutes, unleſſe that the Statute appoints them to be determined in any Court of Record; and the opinion there, that, in any Courts of Record of the King, are reſtrained to the four Ordinary Courts of Record at Weſtminſter, is not held for Law; and continuall experience hath been alwaies againſt it, as the Statute 5 Ed. 6. 14. of Forſtalters, Ingrollers, Regrators gives the penalty to be recovered in any Court of Record: And Juſtices of Aſſiſe in reſpect of their Commiſſion of Oyer and Terminer have alwaies enquired of them, the Statute 33 H. 8. 9. of unlawfull Games; And the Statute of Woods, 35 H. 8. cap. 17. and many other Statutes; and ſo the Quære is well reſolved in 7 Eliz. For the opinion of Eallin Saunders, and Whiddon, there it is held at this day for good Law.

2. The ſecond conſideration was had upon the Statute of 11 H. 4. cap. 9. and it was held, that the ſaid Robert Scarlet was an Offender within the Statute, for it is to be underſtood, that the ſaid Statute is partly affirmative of the Common Law, and partly a new Law.

In affirmance of the Common Law, in part privative, No Indictment ſhall be found by any perſon named to the Juſtices: and in part Poſitive, But by inqueſt of lawfull people of the King, returned by the Sheriff. And that this was in affirmance of the Common Law, the Statute proves it, in the manner as was uſed in the time of his Noble Progenitors: And in the Preamble it is ſaid, againſt the courſe of Common Law uſed and accuſtomed before this time: And that the ſaid Robert Scarlet was an Offender againſt the ſaid Act, for this, that he knowing that he was not returned of the Grand Inqueſt, procured himſelf by falſe conſpiracy to be ſworn, as is aforeſaid: And although that a perſon ſolely was in ſuch undue and unlawfull manner ſworn of the Grand Inqueſt, yet this was within the Act; and by conſequence an offence againſt the Common Law, for that malice and falſneſſe alone may be of great miſchief, as appears in this caſe.

3. The third conſideration was had of 3 H. 8. 10. which alters the ſaid Act of the 11 H. 4. in part, as to denomination; For by the Act of the 3 H. 8. the Juſtices of Goal-delivery or Juſtices of Peace, of whom one to be of the Quorum, in open Court may alter the Pannel returned by the Sheriff to enquire for the King only, by addition or extraction of any Jurors ſo returned; And they have power to command to the Sheriffe to put other in the Pannel, according to their diſcretion: And the Sheriff ought to return the Pannel ſo reformed upon the penalty of the ſaid Act, ſo that none can be of any Grand Inqueſt but by the return of the Sheriff; and for this the Act of 3 H. 8. cap. 10. hath not altered the Law, as to the offence of Robert Scarlet.

4. The ſaid Act 11 H. 4. hath made a new Law, ſcil. That any Indictment found againſt the Act ſhall be void, which branch doth not make void any Indictment, or preſentment, that in the nature of an Indictment found any point contrary to the ſaid Act, is made void by the ſaid Act, ſo that this may draw in queſtion all the Indictments found at the ſame Seſſions: And for this Judgment was given that he ſhould be fined and impriſoned.

Baker

Trin. 10 Jac.

Baker and Halls Caſe.

Star-chamber.

NOte, that upon conſideration of the Statute of 3 H.7. cap.14. It was reſolved by Coke chief Juſtice of the Common Pleas, Yelverton, Williams, Snig, and others; That wheras it is provided, that what perſon ſoever who takes a Woman ſo againſt her will, &c. although that the body of the act extend to taking only, yet in reſpect of this word (ſo) it hath relation to the Preamble (to ſuch perſon as is deſcribed in the Preamble, ſcil. Having ſubſtance) it was agreed by all, that if the Wife hath nothing, nor is Heir apparent, it is out of the Statute, for the Statute would not have been ſo curious in deſcribing the perſon, and all in vain.

2. This word (So) relates to the quality and event of the taking, mentioned in the Preamble, Scil. To be married, or defiled, for if ſhe be not married or defiled, it is not ſuch a taking (ſo) id eſt, ſo married, or ſo defiled; and it is not reaſonable that So ſhall have relation to the taking, which is more remote, and not to the marriage or the defiling, which is neerer Quod fuit conceſſum, &c. and Clergy is taken away by the Statute of 38 Eliz. cap. 9. for Principles or Procurors before, Vide Stamford, fol. 37.b. accordingly: And ſo was the Law taken in the 3 and 4 Ph. &. Mar. as Juſtice Dalliſon reported, vide Lamb. 252. Juſtice of Peace.

Note, the Receivers of the Woman are Principles, but not the Receivers of them who took the Woman, for theſe are but acceſſories, vide Lamb.ibd.

Priviledge of Prieſts.

NOte, that I ſaw a Report in the time of Queen Mary, upon the Statute 50 Ed 3.cap.5.& 1 R.2.c.15. concerning the arreſting of them in holy Church, that the ſaid Statutes are but an affirmance of the Common Law, and in maintenance of the liberties of holy Church, as appears by the preamble of the ſame Statutes, and there held, that Eundo, redeundo & morando, for to celebrate Divine Service, the Prieſt ought not to be arreſted, nor any who aid him in it; as the caſe was of one who admitted the Prieſt to Sing Maſſe, and that the party grieved may have an action upon the Statute, 50 Ed.3. for when any thing is prohibited by an act, although that the act doth not give an action, yet action lyeth upon it; as upon the Statute of Marlb. which prohibites to take in the high way, or Articuli ſuper Chartas 3. which prohibits the Court of Marſhalſey to hold Plea, &c. although that theſe Acts do not give action, yet an action lyeth, 7 A. 6.30.&c. and the Statute 2 H. 5. which commands a Libell to be delivered 4 Ed.4. 37. vide Regiſtrum in Bre.ſuper Stat.

Crown.

NOte, if a man be convicted, or hath judgment of death for a Felony, he ſhall never anſwer by the Common Law, to any Felony done before the Attainder, ſo long as the Attainder remains in force, vide 8 Eliz. cap.4. 18 Eliz. 7. And at this day, if a man be adjudged to be hanged, and hath his pardon, he ſhall never anſwer to any Felony before, for he cannot have two Judgments to be hanged, Aliter, if the firſt Attainder be reverſed by Error: So if a man be Outlawed, and by that attaint of Felony he

he cannot be arraigned of any Felony before, for he cannot be twice attaint, vide 10 H. 4 Coron. 227. caſe del appeal, &c.

A Man ſeiſed of a Mannor to which he hath Stray appendent by preſcription, &c. by his Baily he ſeiſeth an Oxe as a Stray within the Mannor, and makes proclamations according to Law; and within the year and day lets the Mannor with all Royalties, Liberties, and after the year and day paſſed: And Dyer Serjeant did move the Court, who ſhould have the eſtray; And Brown Juſtice was of opinion, that the Leſſor ſhould have it, foraſmuch as he had the poſſeſſion; and when the year and day are paſſed, the Propriety ſhall have relation to the time of the firſt Seiſure: But all the Juſtices were againſt him, and that the Leſſee ſhall have it, foraſmuch as the propriety of the Stray is not altered nor changed before the year and day: And the Lord of the Mannor, untill the year and day are paſt, hath but the Cuſtody, ſo that the Owner may reſhave it alwaies within the year and day, if he will pay for the meat of it: Nor can the Oxe be laboured or uſed by the Lord before the year and day, and therefore he ſhall be paid for the meat, unleſſe it be ſuch a Beaſt as of neceſſity ought to be uſed, as a Milch Cow, &c. And it was held, that if one take a Stray within a year and a day, if it Stray out of the Mannor, the Lord may retake it before Seiſure. Stray.

IN the caſe of Doctor Hutchinſon, Parſon of Kenn, in the County of Devon, It was reſolved Per totam Curiam, that if any ſhall receive or take money, fee, reward or other profit, for any preſentation to a Benefice with Cure, although in truth he which is preſented be not knowing of it, yet the preſentation, admiſſion, and induction are void Per expreſſa verba ſtatuti of 31 H. 8. cap. 6. and the King ſhall have the preſentation Hac vice, for the Statute intends to inflict puniſhment upon the Patron, as upon the Author of this corruption, by the loſſe of his preſentation, and upon the Incumbent, who came in by ſuch a corrupt Patron, by the loſſe of his Incumbency, although that he never knew of it; but if the Preſentee be not Cognizant of the corruption, then he ſhall not be within the clauſe of diſability in the ſame Statute: And ſo it was reſolved by all the Juſtices in Fleetſtreet, Mich. 8 Jac. fol. 7. vide verba ſtatuti, which are very well penned againſt the avarice of corrupt Patrons. Simony, Star. 31 Eliz.

Hugh Manneys Caſe.

IN an Information in the Exchequer againſt Hugh Manney Eſquire the Father, and Hugh Manney the Son, for intruſion and cutting of a great number of Trees in the County of Merioneth, the Defendants plead not guilty: And Rowland ap Eliza Eſquire, was produced as a Witneſſe for the King, and depoſed upon his Oath to the Jurors, that Hugh the Father and the Son joyned in ſale of the ſaid Trees, and commanded the Vendees to cut them down, upon which the Jurors found for the King with great damages; And judgment upon this was given, and execution had of a great part. Perjury.

And Hugh Manney the Father exhibited a Bill in the Star Chamber at the Common Law, againſt Rowland ap Eliza, and did aſſign the Perjury in this, that the ſaid Hugh the Father did never joyn in ſale, nor

command the Tenders to cut the Trees; and the said Rowland ap Eliza was by all the Lords in the Star Chamber convict of corrupt and wilfull Perjury: And it was resolved by all, that it was by the Common Law punishable before any Statute: And although that the Witnesse depose for the King, yet he shall the rather be punished then for another, for the King is the head and Fountain of Justice and Right; and he who perjures himself for the King, doth more offend then if it was in the case of a Subject.

Hayes Case in Curia Wardorum.

BY Inquisition in the County of Middlesex An. 6. Jac. by vertue of a Diem clausit extremum, after the death of Humphrey Wilward, it was found that the said Humphrey died seised of a Messuage and twenty six acres of Land in Stepney; and that John Wilward was his Heir, and of the age of fourteen years and nine daies; and that the Land was held of the King in Capite, by Knights-service, John Wilward died within age, and by inquisition in Mid. 8. Junij An. Jac. by vertue of a Writ of Deveneront, after the death of the said John Wilward, it was found that the said John died seised in Ward to the King, and that the said Messuages and Lands at the time of the death of the said John, were holden of the Dean of Pauls, as of his Manor of Shadwell.

All the mean rates incurred in the time of John Wilward, are paid to the King.

The Questions are,

1. Whether by the death of the said Iohn, and finding of the mean Tenure in the Deveneront, the first Office granted to Points be determined?

2. Whether the Tenure found by the first Office may be trayersed?

And as to these Questions, it was resolved by the two chief Justices and chief Baron, that where the said John died, the Office found by force of the said Writ of Diem clausit extremum, after the death of Humphrey Wilward, whereby the King was entituled to the Guardianship of the said John, hath taken its effect and is executed, and does remain as evidence for the King after the death of the said John, but nevertheless is not traversable, for it is traversable during the time it remains in force only, and the Jurors upon the Deveneront after the death of the said John, are at liberty to find the certainty of the Tenure, and they are not concluded by the first Inquisition, for they are sworn Ad veritatem dicendum, and with this agrees 1 H. 4. 68. And all this appears by the diversity between the Writ of Diem clausit extremum, and the Writ of Deveneront: And it is to be observed, that there is no difference between the Writ of Diem clausit extremum, and the Writ of Deveneront, but in one point; to wit, the

Diem

Diem clauſit extremum is generall, Viz. Quantum terrarum & tenementorum idem H. tenuit de nobis in capite, &c. die quo obijt, & quantum de alijs generally; and the Deveneront recites quod I. filius & Hæres H. qui de nobis tenuit in Capite, nuper dum fuit infra ætatem, & in cuſtodia noſtra fuit, Diem clauſit extremum, ut accipimus: tibi præcipimus, quod per Sacramentum 12. inquiras, quæ terræ & tenementa per mortem prædicti H. & ratione minoris ætatis prædicti I. ad manus noſtras Deveneront, &c. So that this Writ is not generall, but does reſtrain only the Lands and Tenements, Quod Deveneront, &c. and all the other points of the ſaid Writ do relate to the Lands and Tenements, Quæ deveneront, &c. by which it appears, that the firſt Inquiſition is not ſo concluſive, but that by the expreſſe rules of the Writ, the Jurors are at large to find the truth of the Tenure, notwithſtanding the firſt Office. And ſo it was reſolved and decreed accordingly, nono Jacobi, in the Court of Wards in the caſe of Dame Lewes.

Award of Capias utlegatum by Iuſtices of the Peace.

In the ſame Term, the opinion of all the Court of Com. Pleas was, that if one be Out-lawed before the Juſtices of Aſſiſe, or Juſtices of Peace, upon an Indictment of Felony, that they may award a Capias utlegatū; and ſo was the opinion of Periam chief Baron, & all the Court of the Exchequer, as to the Juſtices of Peace, for they that have power to award proceſſe of Out-lawry, have alſo power to award a Capias utlegatum, as incident to their authority and Juriſdiction: ſee the Statute of the 34 H. 8. cap. 14. for certificate of a ſhort Tranſcript of every Attainder, Condiction, or Out-lawry of Felony, by the Clerks of the Aſſiſes, Clerks of the Peace, &c. into the Kings Bench, on penalty of forty ſhillings, &c. And note well, that ſuch Tranſcript is by the ſaid Act made to be of as great force as the Record it ſelf: See Lambert in his Juſtice of Peace, fol. 503. contra, but ſee 1 Ed. 6. cap. 1. Juſtices of Peace in caſe of profanation of the Sacrament ſhall award a Capias utlegatum throughout all England.

Herſeys Caſe, Star-chamber.

John Herſey Gent. exhibited his Bill in the Star Chamber, againſt Anthony Barker Knight, Thomas Barker, Councellor of Law, Robert Wright, Doctor of Divinity, Ravenſcroft Clerk, and John Haynes; and did thereby charge the Defendants with the forging of the Will of one Margery Pain, and the cauſe came to hearing, Ad requiſitionem Defendentium, and upon hearing of the Plaintiffs Councell, there appeared no purpoſe or preſumption againſt the Defendants, or any of them, but that the Teſtament was only proved in the Eccleſiaſticall Court, and upon an appeal was alſo affirmed before Commiſſioners Delegates, and has alſo been decreed in the Chancery; ſo that it appeared to the Court, that the ſaid Bill was preferred of meer malice and ſpite, to ſlander the Defendants without any colour, and becauſe the Defendants has no remedy at the Common Law for the ſaid ſlander, and if ſuch ſlander ſhould paſſe unpu-

niſht

night, it may encourage malicious men to make this Court as a Paſquill, to fix therin a Libell of Record to charge thoſe that are innocent with hainous Crimes, to remain to all perpetuity.

In this cauſe it was reſolved by the Court, that by the courſe of the Court, & according to former Preſidents, the Court may give damages to the Defendants, and ſo was it done, Viz. two hundred pound to the Doctor of Divinity, two hundred marks to the Knight, forty pound to the Clerk, a hundred and twenty pound to the woman, and it was ſaid, that Creare ex nihilo, quando eſt bonum, eſt divinum; ſed creare aliquid ex nihilo, quando eſt malum, eſt diabolicum, & plus Maledicite nocent, quam Benedicite docent.

Hil. 2 Jac.

THeodore Thomlinſon had brought an action of Account for Goods againſt one Philips in the Common Pleas, and therupon Philips ſued Thomlinſon in the Court of the Admiralty, ſuppoſing the Goods to have been received in forrain parts beyond the Seas: and the ſaid Thomlinſon being committed for refuſing to anſwer upon his Oath to ſome Interrogatories there propoſed to him, brought his Habeas Corpus, which was returned thus, Ego William Pope Mareſcallus ſupremæ Curiæ Admiralitatis Angliæ Dom. Juſtic. Sereniſſ. Reginæ noſtræ in brevi huic Schedulæ annex. ſpecificat. Certific. quod infra vocat. Theodore Thomlinſon ante advent. iſtius brevis capt. fuit & cuſtodiæ meæ commiſſ. ex eo quod dictus Theodorus Thomlinſon vinculo ſacramenti coram Judice Admiralitatis Angliæ aſtrictus ad reſpondend. quibuſdam Articulis contra eum in dicta Cur. dat. &c. ſubpœna quinq; librarum &c. contumaciter examen ſuum ſubire recuſavit, Idcirco, &c. And it was reſolved by the Court of Common Pleas.

1. That the Court of Admiralty hath no Cognizance of things done beyond Sea, and this appear plainly by the Statute of 13 Ric. 2. cap. 5. the words of which Statute are, that the Admirals and their Deputies ſhall not meddle from henceforth of any thing done within the Realm, but only of a thing done upon the Sea, Vid. 19 H. 6. fol. 7. For things tranſitory done beyond the Seas, are either triable in the Kings Courts, or the party griefed may have his remedy before the Juſtices where the Fact was done beyond Seas.

2. That the proceedings in the Court of the Admiralty are according to the courſe of the Civill Law, and therfore the Court is not of Record, and by conſequence cannot aſſeſſe any Fine in ſuch caſe, as Judges of a Court of Record may do.

3. That the Return above mentioned was inſufficient, as being too generall, becauſe it is not ſpecified for what cauſe or matter Thomlinſon was examined, ſo as it might appear that the Interrogatories were of ſuch things, as were within their Juriſdiction, and that the party ought by Law to anſwer upon his Oath, for otherwiſe he might very well refuſe.

This Caſe was intended to have been inſerted by my Lord Coke *into his 7th. Report, but not then publiſhed, becauſe the King commanded that it ſhould not be Printed, but the Judges reſolved* ut ſupra.

Right

Right to Seates in the Church.

Corvens Case

COrven did Libell against Pym, an Attorney of this Court, for a Seat in a Church in the County of Devon: And Pym by Serjeant Hutton, moved the Court to have a Prohibition upon this reason, that himself is seised of a house in the said Parish, and that he, and all those whose Estate he hath in the house, have had a Seat in an Isle of the Church: And it was resolved by the Court, that if a Lord of a Manor, or other person, who hath House and Land in the Parish time out of mind, and had a Seat in an Isle of the same Church, so that the Isle is sole and proper to his Family, and they have maintained it at their own Charges, that if the Bishop would dispossesse him, he shall have a Prohibition, for it shall be intended that the parties Ancestors, or those whose Estate he hath, have erected and built the Isle with the assent of the Parson, Patron, and Ordinary, to the intent to have it only to himself. But for a Seat in the body of the Church, if a question ariseth concerning it, it is to be decided by the Ordinary, because the Free-hold is to the Parson, and the place is dedicated and consecrated to the Service of God, and is common to all the Inhabitants: And therefore it belongs to the Bishop to order it in such manner as the Service of God may be best celebrated, and that there be no contention in the Church. And it is to be presumed, that the Ordinary, who hath the cure of Souls, will take order in such cases, according to right and convenience, that is to say, to take care that Gentlemen may have places fit for them, and the poor people fit places for them also: And the ordering thereof is a matter meerly Spirituall; and with this agrees 8 H.7.12. and the chief Justice cited the case of Dame Wiche in 9 H.4.14. and said, the case there was, that the Lady brought a Bill in the Kings Bench against a Parson, Quare unam Tuniam vocatam a Coate Armor & Pennons, with the Armes of the said Sir Hugh Wiche her Husband, and a Sword in a Chappel where he was buried.

And the Parson claimed them as Oblations, and therefore that they did belong to him: And there it is holden, that if one use to sit in the Chancel, and hath there a place, his Carpet, Livery, and Cushion, the Parson cannot claim them as Oblations, neither ought he to have the said things, for that they were hanged there in honour of the deceased; and therefore by the same reason, although a Grave-stone, Coat of Armor, Tomb, &c. are annexed to the Free-hold of the Parson, yet in regard the Church is free to all the Inhabitants for burying, the Parson cannot take them.

And the chief Justice said, that the Lady might have a good action during her life, in the case aforesaid, because she her self caused the said things to be set up there, and after her death, the Heir to the deceased shall also have his Action, because that (as the Book saies) they were hanged there for the honour of his Ancestor, and therefore they are in the nature of Heirlooms, which by the Common Law belong to the Heir, as being the Principall of the Family: The like Law of a Grave-stone, Tomb, and the like.

And this agrees with the Laws of other Nations, Bartho. Cassaneus, fol 13. Concl. 29. Action dat. si aliquis arma in aliquo loco posita, delevit sive abrasit, &c. & in 21 Ed. 3. 48. in the Bishop of Carliles case, it appeared,

that the Ornaments of the Chappel of a preceding Biſhop, do belong to the ſucceeding Biſhop, and are meerly in ſucceſſion, although that other Chattels, in caſe of a ſole Corporation, do belong to the Executors of the deceaſed party, and ſhall not go in ſucceſſion: ſo in the other caſe things erected in the Church for the honour of the dead perſon, ſhall go to his Heirs, as Hirelomes as in manner of an Inheritance.

Note, that in Eaſter Term, 10 Jacobi, It was reſolved in the Court of Star-chamber, in the caſe between Huſſey and Katherine Leyton, and others, that if a man have a Houſe in any Pariſh, and time out of mind he and all thoſe whoſe Eſtate he hath, have uſed to have a certain Pew in the Church, that if the Ordinary will diſplace him, he ſhall have a Prohibition, for if he hath it by preſcription, he has as good right in the Seat, as he hath in his houſe; but obſerve that he muſt claim it as belonging to his houſe, and not in other manner, for properly it belongs to the Inhabitants in the Manor Houſe, if any Manor be, and not to the Manor which includes other Tenants, Farmers, and Inhabitants: But true it is, that the Ordinary ſhall diſpoſe of common and vulgar Seats in the Church, where there is no ſuch preſcription, as is aforeſaid.

Earl of Shrewsburies Caſe.

Ireland.

By force of certain Letters (bearing date 28 Martij 1612) of the Lords of the privy Council, directed to Sir Humphrey Winch, Sir James Ley, Sir Anthony Saintleger, and Sir James Hulleſton; they did certifie to their Lordſhips the Claim of Gilbert Earl of Shrewsbury, to the Dignities of the Earldome of Waterford and Barony of Dungarvan in Ireland, in ſuch manner as followeth.

King Henry the ſixth, by his Letters Patents, in the twentieth year of his Raign, did grant to his thrice beloved Coſin John Earl of Shrewſbury, in conſideration of his approved and loyall Services, in the City and County of Waterford, Pro eo quoque quod eundem conſanguineum noſtrum prædicta terra noſtra Hiberniæ in partibus illis contra inimicorum & Rebellium noſtrorum inſultus potentius defendat, ipſum in Comitem Waterford, una cum ſtilo & titulo ac nomine & honore eidem debitis ordinamus & creamus, habendum to the ſaid Earl and his Heirs Males of his body, and further by the ſaid Letters Patents, did grant the Caſtles, Lordſhips, Honours, Lands, and Manors of Dungervan to the ſaid Earl and the Heirs Males of his body, to hold the Premiſſes of the King and his Heirs, by Homage and Fealty, and by the Service of being his Majeſties Seneſchall in the Realm of Ireland: Afterwards in the Parliament called Der Abſentees, holden at Dublin in Ireland the tenth of May, the twenty eighth of Henry the eight, by reaſon of the long abſence of George Earl of Shrewſbury out of the ſaid Realm; It was enacted, that the King his Heirs and Aſſignes, ſhall have and enjoy in right of his Crown of Engl. all Honours, Manors, Caſtles, Lordſhips, Franchiſes, Hundreds, Liberties, Counties palatines, Juriſdictions, Annuities, Fees of Knights, Lands, Tenements &c. and all and ſingular Poſſeſſions, Hereditaments, and all other Profits, as well Spirituall as Temporall whatſoever, which the ſaid George Earl of Shrewsbury and Waterford, or any other perſon or perſons had to his uſe, &c. King Henry the eighth, by his Letters Patents, the twenty

ninth

ninth of his Raign, reciting the ſaid Statute De Abſentees, Nos præmiſſa conſiderantes, & nolentes ſtatum, honorem & dignitatem prædicti Comitis diminure, ſed amplius augere, de certa ſcientia & mero motu, &c. did grant to the ſaid Earl and his Heirs, the Abby of Rufford, with the Lands thereto belonging in the County of Nottingham, and the Lordſhip of Rotheram in the County of York, the Abbies of Cheſterfield, Shirbrook and Gloſſapdale in the County of Derby, with divers other Lands and Tenements of great value, to be holden in Capite: And the queſtions were:

1. Whether by the long abſence of the Earl of Shrewsbury out of Ireland, by reaſon whereof the King and his Subjects wanted their defence and aſſiſtance there, the Title of the Honour be loſt or forfeited, the ſaid Earl being Peer of both Realms, and reſiding here in England.

2. Whether by the ſaid Act De Abſentees, An: 28 H. 8. the Title of the Dignity of the Earl of Waterford, be taken from the ſaid Earl, as well as the Manors, Lands, Tenements, and other Hereditaments in the ſaid Act ſpecified.

And afterwards by others Letters Patents of the Lords of the Council, dated the twenty ſeventh of September 1612. the two chief Juſtices and the chief Baron were required to conſider of the caſe, which was incloſed within their Letters, and were to certifie their opinions of the ſame.

Which caſe was argued by Counſel learned in the Law, in behalf of the ſaid Earl, before the ſaid chief Juſtices and chief Baron, upon which they having taken great conſideration and advizement, after they had read the Preamble, and all the ſaid Act of the 28 of H. 8. It was unanimouſly reſolved by them all, as followeth.

As to the firſt, it was reſolved, that forasmuch as it does not appear what defence was requiſite, and that the conſideration Executory was not found by Office to be broken as to that point, the ſaid Earl of Shrewsbury notwithſtanding does remain Earl of Waterford.

As to the ſecond, it was reſolved, that the ſaid act of the twenty eighth of H 8. De Abſentees, doth not only take away the poſſeſſions which were given to him at the time of his creation, but alſo the dignity it ſelf, for although one may have a dignity without any Poſſeſſions Ad ſuſtinendum nomen & onus, yet is it very inconvenient that Dignity ſhould be cloathed with Poverty: And in caſes of Writs, and ſuch other legall proceedings, he is accounted in Law a Noble man, and ſo ought to be called, in reſpect of his Dignity, but yet if he want Poſſeſſions to maintain his Eſtate, he cannot preſſe the King in juſtice to grant him a Writ to call him to the Parliament; and ſo was it reſolved in the caſe of the Lord Ogle, in the Raign of Edw: the ſixth, as the Baron of Burleigh, Lord Treaſurer of England, at the Parliament An: 35 Eliz. did report: And therefore the act of the 28 H. 8. (as all other Acts ought to be) ſhall be expounded to take away all inconvenience and therefore by the generall words of the Act, Viz. of Honours and Hereditaments, the Dignity it ſelf, with the Lands given for maintenance of it, are given to the King, and the Dignity is extinct in the Crown: And the cauſe of degradation of George Nevill Duke of Bedford, is worthy the obſervation, which was done by force of an Act of Parliament, 16. June 17 Ed: 4. which Act reciting the making of the ſaid George Duke, doth expreſſe the cauſe of his degradation in theſe words: And forſomuch as it is openly known, that the ſaid George hath not, or by Inheritance may have any livelyhood to ſupport the ſaid Name, Eſtate, and Dignity, or any name of Eſtate; And often times it is ſo ſeen, that when any Lord is called to high Eſtate, and hath not convenient livelyhood to ſupport the ſame Dignity, it inducеth great poverty and invigence, and cauſeth

Honour taken away for poverty.

ſeth often-times great Extortion, Imbracery, and Maintenance to be had, to the great trouble of all ſuch Countries, where ſuch Eſtate ſhall happen to be: Wherefore the King by the advice of his Lords Spirituall and Temporall, and by the Commons in this preſent Parliament aſſembled, and by the authority of the ſame, ordaineth, eſtabliſheth, and enacteth, that from henceforth the ſame Creation and making of the ſaid Duke, and all the names of Dignity given to the ſaid George, or to John Nevill, his Father, be from henceforth void and of none effect, &c. In which Act theſe things are to be obſerved.

1. That although the Duke had not any Poſſeſſions to ſupport his Dignity, yet his Dignity cannot be taken from him without an Act of Parliament.

2. The Inconveniences do appear where a great State and Dignity is, and no livelyhood to maintain it.

3. It is good reaſon to take away ſuch Dignity by Act of Parliament, and therfore the ſaid Act of the 28 H.8. ſhall be expounded according to the generall words of the Writ, to take away ſuch inconvenience: And although the ſaid Earl of Shrewsbury be not only of great Honour and Vertue, but alſo of great Poſſeſſions in England, yet it was not the intention of the Act to continue him Earl in Ireland, when as his Poſſeſſions in Ireland were taken away from him, but that the King at his pleaſure might confer as well the Dignity as the Poſſeſſions to any other, for the defence of the ſaid Realm. And the ſaid Letters Patents de Anno 29 H. 8. hath no words to reſtore the Dignity, which the Act of Parliament hath taken away, but it was not the intent of the King *Diminuere ſtatum, honorem & dignitatem ipſius Comitis*, but *augere* his Poſſeſſions for maintenance of his Dignity, for ſo much appears by this word *Augere*, for he doth by the ſaid Letters Patents, with exceeding great bounty increaſe the Revenues of the ſaid Earl in England, which the King did think was an encreaſe of large Poſſeſſions in England, inſtead of all that which was taken away from him by the Act of the 28 H.8.

And whereas it was obiected, that the generall words Honors and Hereditaments are explained and qualified by the ſaid words Relative ſubſequent, Which the ſaid George, or any to his uſe hath; and therefore it ſhall not be intended of any Honour or Hereditament, but of ſuch whereof others are ſeiſed to his uſe, and no man can be ſeiſed of the Dignity, and therfore that the ſaid Act doth not extend to it: but that it is to be underſtood Reddendo ſingula ſingulis, and theſe words, Which the ſaid George Earl hath, are ſufficient to paſſe the Dignity, and with this agrees the opinion of all the Iudges of England in Nevils caſe upon the like words in the Statute of the 28 H.8. in the ſeventh part of my Reports, fol. 33, & 34.

Hil.

Hil. 2 Jac.

Juriſdiction of the Court of Common Pleas.

In the laſt Term, by commandment of the King, the Juſtices of the Kings Bench, and the Barons of the Exchequer, were aſſembled before the Lord Chancellor Elſmer at York houſe, to deliver their opinions, whether their was any authority in our Books that the Juſtices of the Common Bench may upon information made to the Court (which commonly is called ſuggeſtion) grant Prohibitions, or whether of neceſſity every Plea ought to be pending in the Court for ſuch cauſe, and the King would know their opinions in this caſe: And the Judges took time to deliver their opinions untill this Term. And then Fleming chief Juſtice, Tanfield chief Baron, Snig, Altham, Crook, Bromley, and Doderidge, (Yelverton and Williams Juſtices being dead ſince the laſt Term) did deliver their opinions to the ſaid Lord Chancellor. That the Preſidents of each Court are ſufficient Warrants for their proceedings in the ſame Court; and therefore as well in the Kings Bench and in the Exchequer, as in the Common Bench, the Judicial Preſidents in them are good Warrants of their proceedings, and therefore for a long time, and in many ſucceſſions of reverend Judges, Prohibitions upon information, without any other Plea pending have been granted, Iſſues tried, Verdicts, and Judgments given upon Demurrer; all which being in force, they were unanimouſly agreed to give no opinion againſt the Juriſdiction of the Court of the Common Bench in this caſe, and none of the Judges of the Common Bench were called, or preſent at any conference concerning this matter, and yet Laqueus confractus eſt, & nos liberati ſumus. Et, magna eſt veritas & prævalet: See my particular Treatiſe of the Juriſdiction of the Common Bench in this point, by which the Juriſdiction of that Court evidently appeares.

Hill. 10 Jac.

Parliament in Ireland.

The Lords of the Councell did write to the two cheife Juſtices and cheife Baron in theſe words, After our hearty commendations to your Lordſhips: Whereas his Majeſty for divers weighty conſiderations hath reſolved to hold a Parliament within the Realme of Ireland: And that by an Act made in the tenth yeare of H. 7. called Poynings Act, It is provided, That all ſuch Bills as ſhall be offered to the Parliament there, ſhall be firſt tranſcribed hither under the great Seal of that Kingdom, and having received allowance and approbation here, ſhall be put under the great Seal of this Kingdom, and ſo returned thither to be preferred to the Parliament, foraſmuch as there are accordingly tranſferred hither from thence

divers Bills, as well publick as private, ſome of which Bills were firſt agreed on here, ſome others were framed and conceived there, and coming now hither may happily receive amendment and alteration; We have thought meet for avoidance of any queſtion, or inconvenience that may ariſe of the manner & form of proceedings in amending or altering of thoſe Bills, hereby to pray and require you, calling to you his Majeſties Attorney and Solicitor, to look into Poynings Act, and to conſider of ſuch courſe as ſhall be fit to be held concerning the ſame, &c. *Dat. ultimo Junii* 1612. Upon which in this Term the ſaid chief Juſtices, chief Baron, Attorney, and Solicitor generall were aſſembled two ſeverall dates at Serjeants Inne; and they had not only conſidered of the 10 H. 7. cap. 4. called Poynings Act; but alſo of an Act made in the Realm of Ireland, 3 and 4 Phil. & Mar. cap. 4. intituled, An Act declaring how Poynings Act ſhall be expounded and taken: For by the ſaid Act of the 10 H. 7. it is provided, that no Parliament be hereafter holden in the ſaid Land of Ireland, but at ſuch ſeaſons as the Kings Lievtenant and Councel there firſt do certifie the King under the great Seal of that Land, the cauſes and conſiderations, and all ſuch Acts as to them ſeemeth ſhould paſſe in the ſaid Parliament: And ſuch Cauſes, Conſiderations, and Acts affirmed by the King and his Councell, to be good and expedient for the Land, and his Licenſe thereupon, as well in affirmation of the ſaid Cauſes and Acts, as to ſummon the ſaid Parliament under the great Seal of England had and obtained: That done, a Parliament to be had and holden after the form and effect before rehearſed: And if any Parliament be holden in that Land hereafter, contrary to the form and proviſion aforeſaid, it be deemed void and of none effect in Law. Upon which Act divers doubts and ambiguities were conceived, ſome whereof were of greater difficulty then others. And firſt, A doubt was conceived, whether the ſaid Act of the 10 of H. 7. does extend to the Succeſſors of H. 7. for that the Act ſpeaks only of the King generally, and not of his Succeſſors. 2. If the Queen Mary were within the word King; and although theſe were not matters of great ambiguity, for that this word KING, which imports his politick Capacity, which never dies, and being ſpoke indefinitely, does extend in Law to all his Succeſſors, yet is this ſo expounded by the ſaid Act of 3 and 4 Phil. and Mar. viz. That the ſaid Act of the 10 of H. 7. ſhall extend to the Kings and Queens Majeſty, her Heirs and Succeſſors. Secondly, Where the Act of Poynings ſates, The Kings Lievtenant and Councel there, a ſcruple did ariſe; that if the King appoint one by the name of his Deputy, or Lord Juſtice, or if he conſtitute two Lords Juſtices, chief Governor or Governours, and the Councel, &c. and therefore it is explained in the Act of the 2 & 3 Phil. & Mar. that the ſaid Act of Poynings extends to all of them. Thirdly, The greateſt and moſt difficult doubt was upon theſe words of the Act of Poynings: And ſuch Cauſes, Conſiderations, and Acts affirmed by the King and his Councell to be good and expedient for that Land, &c. Whether the King may make any change or alteration of the cauſes, conſiderations, or acts which ſhall be tranſmitted hither from the Lievtenant and Councell of Ireland, for that it is not affirmative, but correction and alteration of them; and therefore it was neceſſary to explain, that the Act of the 3 & 4 Phil. & Mar. was in theſe words. Either for the paſſing of the ſaid Acts, and in ſuch form and tenor as they ſhould be ſent into England, or elſe for the change or alteration of them, or any part of the ſame. Fourthly, Another queſtion was upon the words of the firſt Act, Viz. That done, a Parliament to be had and holden, &c. If at the ſame Parliament other Acts, which have been affirmed or altered here, may be enacted by the authority of the Parliament there,

The word *King* extends to his Succeſſors.

The word *King* extends to the word *Queen*.

there, the which is explained by the said last Act in these words, Viz. For passing and agreeing upon such Acts, and no others, as shall be so returned under the great Seal of England. Fiftly, Great doubt did arise on these words, That done a Parliament to be holden, whether the Lieutenant and Councell of Ireland, after the Parliament begun, and Pendente Parliamento, may upon debate and conference had there, transmit any other considerations, Causes, Tenors, Provisions, and Ordinances, as shall seem to them to be good to be enacted at the said Parliament within the Realm of Ireland, the which is explained by the said 3 & 4 Phil. & Mar. by expresse words, that they may.

Note Reader, the order of Proceedings and Summons of Parliament in Ireland; First, the Lieutenant and Councell do certifie under the great Seal of Ireland the causes and considerations of all such Acts, as seem good to them to be passed in Parliament, so that originally it is to begin there. 2. They are to be affirmed, altered, or changed, and returned under the great Seal. 3. License under the great Seal to summon and hold a Parliament. 4. To be done *Pendente Parliamento*, as it appears ought to be.

And it was unanimously resolved, that the Causes, Considerations and Acts transmitted hither under the great Seal of Ireland, ought to be kept and preserved here in the Chancery of England, and shall not be remanded. 2. If they be affirmed, they ought to be transcribed under the great Seal & returned into Ireland, & all that which passes the great Seal ought to be enrolled here in the Chancery. 3. If the acts transmitted hither be in any part altered or changed here, the act so altered and changed, ought forthwith to be returned under the great Seal of Eng. but the Transcript under the great Seal of Ireland, which remain in the Chancery here, shall not be amended, but the amendment shall be under the Great Seal of Eng. as aforesaid, returned into Ireland, without any signification or certification of their allowance by those in Ireland, for as the acts move originally from Ireland, so the amendments or alterations move here in Eng. all the Bills which are transmitted here from Ireland, are with the petition of the Deputy & Councel of the King altogether under the great seal of Ireland, and so all the acts which are affirmed or altered, are returned together under the great seal of Eng See 10 H. 6. 8. which begins Mic. 18 H. 6. Rot. 46 coram Rege, how the Parl. in Ireland was holden there before Poynings act. And see another act made at the Parl. in Ireland in the same year of 10 H. 7. c. 22. it is enacted, that all Stat. late made within this Realm of Eng. concerning or belonging to the common and publick Weal of the same, from henceforth to be deemed good & effective in the Law, and over that, be accepted, used and executed within this land of Ireland, in all points, at all times requisite, according to the tenor & effect of the same: And over that, by the authority aforesaid, that they and every of them be authorised, proved, and confirmed within the said Realm of I. and if any Statute or Statutes have been made within this said Land heretofore to the contrary, that they and every of them by the authority aforesaid, be annulled and revoked, void and of none effect in the Law. And observe, that this word (late) in this act, hath the same sence as (before) so that this act extends to all acts of Parliam. made in Eng. before the act of 10 H. 7. And that is the reason, that all acts of Parl. made in Eng. before this act concerning Ireland, but only general acts made since the said act of 10 H. 7. do not bind them, because that (as it hath been said) they have a Parliament for the Realm of Ireland, and those of Ireland do not come to our Parliament, vid: R: 3. 12. Hibernia habet Parliamenta & faciunt leges, & nostra statuta non ligant eos, quia non mittunt Milites ad Parliamentum, sed personæ eorum sunt Subjecti Regis, sicut Inhabitantes Calinæ, Goscogniæ & Guienæ.

But

Note: But queſtion is made of this in ſome of our Books, vid. 20 H. 6. 8. 32 H. 6. 25. 1 H. 7. 3. 8 H. 7. 10 8 Rich. 2. proceſſe 204. 10 Ed. 5. 41. 13 Ed. 2. titulo baſtard, 11 H. 4. 77 Ed. 4 27. Plowdens Comment. 368. 13 Eliz. Dyer 305. 2 Eliz: Dyer 266. Calvins Caſe in the ſeventh part of my Reports, 226 14 Ed. 3. 184. A Prebend in England is made Biſhop of Dublin in Ireland, his Prebendary is void.

Note, See the Statute of Ireland, upon what Books and Acts of Parliament: this queſtion is now by common experience and opinion without any ſcruple. reſolved, That the Acts of Parliament made in England ſince the Act of the 10 H. 7. do not bind them in Ireland; but all Acts made in England before the 10 H. 7. by the ſaid Act made in Ireland An: 10 H. 7. cap. 22. do bind them in Ireland.

Where a Statute in *England* is of force in *Ireland*.

Dignity, Prerogative. NOte, that Camden King at Armes told me, that ſome held that if a Baron dies, having iſſue divers Daughters, the King may confer the Dignity to him who marries any of them, as hath been done in divers caſes, Viz. In the caſe of the Lord Cromwell, who had iſſue divers Daughters, and the King did confer the Dignity upon Barchier who married the youngeſt Daughter, and he was called Lord Cromwell: And ſo in other caſes: And he ſaid, that the Earl of Glocester, who had married the Daughter of King Henry the third, and the Counteſſe after married Mount Hermer, who was her Husbands Secretary, for which the King impriſoned him; and after being reſtored to the Kings favour, during the minority of the Son of the ſaid Earl of Glocester, and untill the Infant came of full age, and when the Infant was of full age, he was called to the Parliament by the name of the Earl of Glocester, and the other by the name of Mount Hermer Knight; alſo he ſaid, that it appears in the Edict, or Statute made in France, that if any be made Duke, Marquiſſe, Earl, or Baron of any priviledged place, as of Guiſe, &c. if he dye without Heire Male of his body, the Dignity is not only extinct, but the King ſhall have the Manor or Territory whereof he took his name and Dignity: Sed nos non habemus talem conſuetudinem.

Eccleſiaſticall juriſdiction. NOte (by Linwood) that it appears that by the Canons Eccleſiaſtick, none may exercise Eccleſiaſticall Juriſdiction, unleſſe he be within the Orders of the Church, becauſe none may pronounce excommunication, but a Spirituall perſon: And there it appears, that as well the Regiſter as the Judge ought to be Spirituall, but now by the Statute of the 37 H. 8 cap. 17. A Doctor of Law or Regiſter, although he be a Layman, may exercute Eccleſiaſticall Juriſdiction.

Note alſo, that by the Canons no Eccleſiaſticall Judge ought to cite any Church-warden to the Court, but ſo as he may return home again to his houſe the ſame day.

Alſo the Canons do limit how many Courts Ex officio they may have within a year.

Mich.

Mich. 11 Jac.

NOte, that if a man give to one of his Children a certain ſumm in his life, and after dies, although this is not given as a Childs full Portion, yet it ſhall be ſufficient for him: but if the Father by writing, or by Will does declare, that it is but part of a Childs Portion, then he ſhall have a full Childs part, otherwiſe not. But ſome made a difference where this ſumm ſo given, and declared to be but for part, ſhall be accounted upon account parcel of the intire Eſtate, or not; that is to ſay, if the Iſſue ſo in part advanced, ſhal have ſo much as amounts to a Childs part, and that the Wife and the Executor ſhall gain therby, where that this Portion ſo given, ſhall be of no benefit to the Wife, or the Executors. Cuſtome of *London.*

As if a man hath two Children, and gives to one of them a hundred pound in part of his advancement, and then dies worth 900 l. in this caſe the Wife, the Iſſue not advanced, and the Executors ſhall have but three equal parts of the 900 l. Viz. three hundred pound a peece; and then this hundred pound ſo given ſhall be in Hotchpot between the Children: which (as I think) cannot be, for then there ſhall not be equality among the Iſſues, as the Cuſtom doth require, who ought in my opinion to have the precedency of favour, if any be.

Note, it was holden by the Judges in the Kings Bench: That if a man be poſſeſſed of a houſe and term for years, doth deviſe for years, does demiſe this to his Wife for life, the remainder over, and dies, all his Debts being paid; If the Widow enters generally, and converts the profits to her own uſe, and not to pious Works; this is a determination of her Election: And this is the generall caſe, and therfore it is good that it be ſpecially found. Deviſe.

Haynes Caſe.

NOte, in the Lenten Aſſiſe holden at Leiceſter 11, and 12 Jac. the caſe was, That one William Haynes had digged up the ſeverall Graves of three men and one Woman in the night, and had taken their winding Sheets from their bodies, and buried them again: And it was reſolved by the Juſtices at Serjeants Inne in Fleetſtreet, that the property of the Sheets remain the Owners, that is, in him who had property therin, when the dead body was wrapped therwith: for the dead body is not capable of it, as in 11 H. 4. If Apparel be put upon a boy, this is a Gift in Law, for the boy hath capacity to take it, but a dead body being but a lump of earth, hath no capacity; alſo it is no Gift to the perſon, but beſtowed on the body, for the reverence towards it, to expreſſe the hope of Reſurrection. Alſo a man cannot relinquiſh the property he hath to his Goods, unleſſe they be veſted in another; and accordingly at the ſaid Aſſiſes, he was ſeverally indicted for taking of each of theſe Sheets: And the firſt Indictment was of petty Larceny, for which he was whipped: And at the ſame Aſſiſes he was alſo indicted for the Felonious taking the three other ſheets, for which he had his Clergy, and ſo eſcaped the ſentence of death, which he well deſerved, for this inhumane and barbarous Felony. Felony to ſteal a Winding ſheet. Who hath property in them.

Hil. 11 Jacobi.

Earl of Derbies Case.

County Palatine.

IN the Chancery, between Sir John Egerton Plaintiff, and William Earl of Derby, Chamberlain of Chester and others, Defendants, for the trust and interest of a Farm called Budshaw in the County of Chester: It was resolved by the Lord Chancellor, the chief Justice of England, the Master of the Rolls, Doderidge, and Winch Justices.

1. That the Chamberlain of Chester, being sole Judge of Equity, cannot decree any thing wherein himself is party, for he cannot be a Judge in propria causa; but in such case where he is party, the Suit shall be heard here in the Chancery, Coram Domino Rege.

2. If the Defendants dwell out of the County Palatine, he who hath cause to complain in equity, may also complain here in the Chancery, for in respect that proceedings in Chancery do bind the person only, if the person be out of the Jurisdiction, the Chamberlain of Chester cannot relieve the party; and therefore, Ne curia Domini Regis deficeret in justitia exhibenda, the Suit shall be here in the Chancery, for else the Subject shall have good right, and yet have no remedy, which will be inconvenient.

And this does persue the reason of the common Law, as appears 13 Ed. 3. tit. Jurisdiction, 8 Ed: 2. Ass. 382. 5 Ed: 3. 30. 30 H. 6. 6. 7 H. 6. 37. The Case of the Lord of the Marches of Wales, although an Action will lye in Wales, yet because he which hath cause of Action cannot have Justice there, he shall sue here in the Kings Bench; for where the particular Courts cannot do Justice to the parties, they shall sue in the Kings generall Court at Westminster, 11 H: 4. 27. 8 Ed: 4. 8. in all cases where it appears to the Court, that those who have liberties to take Conizans, do fail of right, as in matter of foraign plea, &c. the matter shall be determined in the generall Courts at Westminster.

Note: Causes in equity may not be determined by Commissions.

3. It was resolved, that the King cannot grant a Commission to determine any matter of equity, but it ought to be determined in the Court of Chancery, which hath had Jurisdiction in such case time out of mind, and had alwaies such allowance by the Law: But such Commissions or new Courts of equity shall never have such allowance, but have been resolved to be against Law, as it was agreed in Potts case.

4. upon consideration had of the Certificate of the Lord Dyer and other Justices in the time of Queen Elizabeth, concerning the Jurisdiction of the County Palatine of Chester; it was resolved, that for things transitory, although that in truth they be within the County Palatine; the Plaintiff may by Law alledge them to be done in any place within England, and the Defendant may not plead to the Jurisdiction of the Court, that they were done within the County Palatine: See Dyer 13 Eliz. fol: 302. 716. Office found by Mandate out of Chancery of Land in Cheshire is void.

Forms

Forms and Orders of Parliament.

Proceedings in Parliament.

IN the House of Commons, when the Speaker is chosen, he in his place where he first shall sit down, shall disable himself, and shall pray that they would proceed to a new Election: but after he is put into the Chair, then he shall pray them, that with their favours he may disable himself to the King, so that their expectations may not be deceived.

But note, that the King the first day of Parliament shall sit in the upper house of Parliament, and there the King or the Lord Chancellor by his commandment, shall relate and shew the causes of calling the Parliament, the which are best founded on the words of the Writ of Summons of Parliament (which is a good Subject to treat on, &c.) and then in the conclusion of the Oration, the Commons are commanded to chuse a grand and learned man to be their Speaker. Upon which the Commons shall presently assemble themselves in the lower house, and he is to be a Member of their Parliament, and hereupon he shall disable himself ut supra.

And two or three dates after the Commons shall present their Speaker in the upper house to the King, where he shall disable himself again to the King, and in most humble manner shall intreat the King to command them to choose a more sufficient man: And after he is allowed by the King, then he shall make an Oration, and in the conclusion shall pray the four usuall Petitions; the which Oration being answered by the Lord Chancellor, and his Petitions allowed, the Speaker and the Commons shall depart to the house of Commons, where the Speaker in the Chair shall request the Commons, that inasmuch as they have chosen him for their mouth, that they would assist him, and favourably accept his proceedings, which do proceed out of an unfeigned and sincere heart to do them Service.

Note, in the lower house, when a Bill is read, the Speaker does open the parts of the Bill, so that each Member of the house may understand the intention of each part of the Bill; and the like is done by the Lord Chancellor in the upper house; then when it is read the second time, sometimes it is ingrossed without any Commitment, but then the Speaker makes question of it in this manner: The question is, Whether this Bill shall be engrossed, or not. As many as would have the Bill ingrossed, shall say, Yea, and as many as would not, say, No.

But in the upper house of Parliament when such question is made about engrossing, if there be no contradiction, the Lords do not deliver their assent in saying, Content, or their dissent in saying, Not content, for Husbanding the time: but if there be any contradiction, it is tried Seriatim, by content, or not content, but neither in the upper or lower house, the Lord Chancellor or Speaker shall not repeat a Bill or an amendment but once.

When a Bill is committed to the second reading, then if the Committees amend it in any point, then they shall write down their amendments in a paper, and shall direct to a line, and between what words the amendments shall be put in, or what words shall be interlined, and then all shall be ingrossed in a Bill.

And if a Bill passe in the Commons house, and the Lords amend the Bill when it is sent to the upper house, they do as before shew the line, and between what words, and after the amendments are ingrossed with particular

ticular references, and the Bill with the amendments are ſent again to the houſe of Commons where they affirm them: the amendments are read three times, and then they inſert them into the body of the Bill, and ſo E converſo, of a Bill which paſſeth firſt in the upper houſe. But note, that in none of theſe caſes the intire Bill ſhall not be read again in the houſe wherin they firſt paſſe, but the amendments only, for no Bill ſhall be read above three times.

No Lord ought to ſpeak to the Bill two times in one day. Alſo no Knight, Citizen, or Burgeſſe ought to ſpeak above once to one Bill in one day, unleſſe ſometimes by way of explication.

No private Bill ought to be read before the publick Bills, unleſſe the one houſe or the other do require it.

Note, in the houſe of Commons, thoſe that are for the new Bill (if there be a queſtion of voices) ſhall go out of the houſe, and thoſe who are againſt the Bill, and for the Common Law or any former Law, ſhall ſit ſtill in the houſe, for they are in poſſeſſion of the old Law: And in the upper houſe two Lords are appointed, one of the one part, the other of the other to number the voices.

In both houſes, he which firſt ſtands up to ſpeak, he ſhall firſt ſpeak, without any difference of perſons.

When a Bill is ingroſſed at the third reading, it may be amended in the ſame houſe in any matter of ſubſtance, a fortiori, the error of the error of the Clerk in the ingroſſing may be amended, &c.

Paſch. 12. Jac.

Walter Chutes Caſe.

New erected Office void.

WAlter Chute Sewer to the King, did exhibite a Petition to the King, that for the ſafety of the Realm, and the ſecurity of ſtrangers within the Realm, that the King would vouchſafe to erect a new Office of Regiſtring of all ſtrangers within the Realm, except Merchant-ſtrangers, to be kept at London, and to grant the ſaid Office to the Petitioner, with a reaſonable Fee, or without a Fee: And that all ſtrangers, except Merchant-ſtrangers, might depart the Realm within a certain convenient time, if they do not repair to the ſaid Regiſter, and take a Billet under the Regiſters hand: Which Petition the Lords of the Councel did refer to me, by their honourable Letters of the 13. of Novem. 1613. that I calling to me Councel learned in the Law, ſhould conſider what the Law is in that behalf, and how it may ſtand with conveniency and policy of State, to put the ſame in execution, and by whom it ought to be performed: And upon conference had with the Juſtices of the Common Pleas, and the other Juſtices and Barons of Serjeants Inne in Fleetſtreet; It was reſolved, that the erection of ſuch new Offices, for the benefit of a private man was againſt all Law, of what nature ſoever: And therfore where one Captain Lee did make ſuit to the King to have a new Office to make Inventory of Goods of thoſe who died teſtate or inteſtate; It was reſolved by the Lord Chancellor and my ſelf, that ſuch Grant ſhall be utterly void, although no certain perſon hath it, and that this was againſt Common Law, and the Statute of 21 H. 8. In like manner another ſued

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to have the Regiſtring of Birth-dates, and the time of the death of each perſon within the Realm, and that it might be on Record and authentically: So Mich. 19 Jac. To make a new Office in the upper Bench, for the only making of all Latitats at the ſuit of the Lord Davbigny, and after him of the Lord John Hungerford, and others, was reſolved to be void. So Littletons ſuit, to name an Officer to be a generall Regiſter, or rather Tabler, or Indexer of all Judgements, for Debts and Damages, Recognizances, Bils, Obligations to the King, Deeds inrolled, Fines upon Offenders in the Star chamber, and other Courts whatſoever: and this was pretended to be for the benefit of the Purchaſer, and the ready finding of Records; and to ſuch purpoſe was made the Statute of the 27 Eliz. for inrolling of Statutes; but the Suit was rejected by the two chief Juſtices and others: for every Court ſhall chooſe Officers either by Law or Preſcription: the Law or Cuſtom may not be changed without a Parliament, and ſo it was reſolved Hil. 12 Jac. Regis; and divers other ſuch inventions were reſolved to be againſt Law and Record.

As to the ſecond, in the caſe of Sir Walter Chute, concerning the conveniency or inconveniency of it, it was reſolved, that it was inconvenient for divers cauſes. 1. For a private man to have private ends. 2. The numbring of Strangers by a private man would infer a Terror, and the King and Princes of other Countries will take offence at it, and will do the like to the Kings Subjects. 3. It is to be conſidered what breach it will be to former Treaties.

As to the third, in the caſe of Sir Walter Chute, that may be performed without any inconvenience; and ſo it was deviſed by the Lord Burleigh, and other Lords of the Councel: An. 37 Eliz. viz. To write Letters to the Majors, Bayliffs, or other head Officers of every City, Borough, or Town where any ſtrangers are reſident, to certifie how many ſtrangers, and of what quality are in their Cities, &c. the which they are to know in reſpect of their Inhabitants, and Contributions to the poor, and other charges, and this may be done without any writing.

Which Suit being made to the Lords, was well approved by them, and the Suit utterly diſallowed the 3. Dec. An. 3 H. 8. Commiſſion granted to divers, to certifie the number of Strangers Artificers, with the number of their Servants within London, and the Suburbs therof, &c. according to the Statutes: See Candiſh caſe, 29 Eliz. for making of all Writs of Superſedeas in the Kings Bench.

13 Eliz. A grant of an Office to Thomas Kniver, to examine all his Majeſties Auditors and Clerks of the Pipe concerning their Offices for years: It was reſolved by the Court to be againſt Law, for it belongs to the Barons who are Judges; and it is alſo an Invocation in a Court of Juſtice. 25 Eliz: A Grant of an Office to Tho. Leichfield to examine all deceits falſe allowances of the Queens Officers for eight years, reſolved to be void.

The making of Subpœnas in Chancery anciently belonged to the ſix Clerks: The late Queens Majeſty granted the ſame by Patent to one particular man.

The keeping and filing of Affidavits in Chancery anciently belonged to the Regiſter. The Kings Majeſty that now is, granted the ſame to one particular man.

The erecting and putting down of Inns hath been anciently in the power of the Juſtice of Peace. His Majeſty hath given that power by Patent to a particular man.

The taking of the Depoſitions, and all other proceedings before and by the Commiſſion which hath uſed to be taken and kept by the Commiſſioners themſelves, or ſome Clerk of their appointment, his Majeſty hath granted the ſame by Patent to one particular man.

The King by his Letters Patents granted to Simon Darlington the Office of Alveger, and limited what Fees he ſhould take.

The ſole drawing, writing, and ingroſſing of all Licenſes and Pardons was granted to Edward Bacon Gent. with the Fee that had formerly been taken, and a Reſtraint for all others, &c.

The Offices of Subpœnas was granted to Thomas George and others during life, with the fee of 2 s. and a reſtraint that no others preſume to make thoſe Writs.

The Office of making and regiſtring all manner of aſſurances and Policies, &c. was by Letters Patents granted to Richard Gandler Gent. with ſuch fees as the Lord Major and others ſhould rate, with power to rate fees, and a reſtraint of all others, &c. which was during pleaſure, and afterwards to him and others during lives.

The Office of writing Tallies and Counter-Tallies granted to Sir Vincent Skinner.

Quare. The Office of ingroſſing Patents to the great Seal, and an encreaſe of fees granted late to Sir Richard Young, and Mr. Pye.

Sir Stephen Procters Caſe.

Judges divided in the *Star chamber.*

IN an Information preferred in the Star Chamber by the Attorney-generall, againſt Stephen Procter, Berkenhead, and others, for Scandall and Conſpiracy of the Earl of Northampton, and the Lord Wooton. At the hearing of this caſe, were preſent eight Lords, Scil. The chief Baron, the two chief Juſtices, two Biſhops, one Baron, the Chancellor of the Exchequer, and the Lord Chancellor: And the three chief Juſtices, and the Tempozall Baron condemned Sir Stephen Procter, and fined and impriſoned him: But the Lord Chancellor, the two Biſhops, and the Chancellor of the Exchequer acquitted him. And the queſtion was, if Sir Stephen Procter ſhall be condemned or acquitted; and it ſeemed to ſome of the Clerks Prima facie, that the better ſhall be taken for the King, and that he ſhall be condemned, but others were of the contrary opinion; and hereupon the matter was referred to the two chief Juſtices, calling to their aſſiſtance the Kings learned Counſel: And firſt they reſolved, that this queſtion muſt be determined by the Preſidents of the Court of Star Chamber, for that Court is againſt the rule and order of all other Courts, for in the Kings Bench, the Common Pleas, or the Exchequer, or in the Exchequer Chamber, where all the Juſtices are aſſembled, if the Juſtices are equally divided, no judgment can be given. And ſo it is in the Court of Parliament; and therefore this courſe ought to be warranted by the cuſtom of the Court: And as to that, two Preſidents only were produced for the maintenance of the ſaid Cuſtom, Viz. One in the Hilary Term, 39 Eliz. between Gibſon Plaintiff, and Griffith and others Defendants, where the Complaint was for a Miſt, and at the hearing of the Caſe, there was eight preſent, four gave their judgments that the Defendants were guilty, but the other four, whereof the Lord Chancellor was one, pronoun-

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red the Defendants not guilty, and no ſentence of condemnation was ever entred, becauſe the Lord Chancellor was one of the four who acquitted them. The other was Hil. 45 Eliz. In an information by the Attorney-generall againſt Katherne and others, for forging of a Will, and a Miſdemeanour for procuring a fraudulent Deed to defeat the Queen of her Eſcheat: And eight were in preſence at the hearing of the Cauſe, whereof four found the Defendants guilty of Forgery, and did inflict the punishment according to the Statute of the 5 Eliz. but the others, whereof the Lord Chancellor was one, gave ſentence, that the Defendants were guilty of the Miſdemeanour, and not of the Forgery, and impoſed a Fine of 500 l. only, which decree was entred according to the Lord Chancellors voice, although the ſentence on the other ſide was more beneficiall for the King, and no other preſident could be found in this caſe, the which I have reported this Term.

NOte the exaction under the good name of Benevolence began in this manner. Concerning Benevolence.

When King Edward the fourth, had a Subſedy granted to him in the 12 Edw. 4. by Parliament, becauſe he could have no more by Parliament, and without a Parliament he could not have any Subſedy to be levied of the Lands and Goods of the Subject, he invented this ſhift or deviſe, in which three things are to be obſerved.

1. The cauſe.
2. The Invention.
3. The Succeſſe.

1. The Duke of Burgandy, who had married Margaret, the Siſter of Edw. 4. ſolicited King Edward to joyn in War with him againſt the French King, to which the King eaſily conſented, becauſe he fought revenge againſt the French King for aiding the Earl of Warwick, Queen Margaret, and Prince Edward, and their party, and therfore, to make War againſt the French King, was the cauſe. Hollingſhead, 11 Ed. 4 694. Stow. 701.

2. The invention was, The King called before him at ſeverall times a great number of the wealthieſt of his Subjects, to declare to them his neceſſity, and his purpoſe to levy War for the honour and ſafety of the Kingdom, and demanded of each of them a certain ſumm of money, and the King treated with them, with ſuch great grace and clemency, and with ſuch gentle prayer to aſſiſt him in his neceſſity, for the honour of the Realm, that they very freely yeelded to his requeſt, for the honour and ſafety of the Realm. Amongſt the reſt, there was a Widow of a very good Eſtate, of whom the King meerly asked what ſhe would willingly give him for the maintenance of his Wars; By my faith, quoth ſhe, for your lovely countenance ſake, you ſhall have twenty pound, which was more then the King expected; the King thanked her, and vouchſafed to kiſſe her, upon which ſhe preſently ſwore he ſhould have twenty pound more.

3. The ſucceſſe and event was; That whereas the King called this a Benevolence to pleaſe the people, yet many of the people did much grudge at it, and called it a Malevolence.

Primo Ed. 5. in the Oration of the Duke of Buckingham in Guild hall in London, he inveighed, amongſt other things, againſt this Taxation under the name of Benevolence. 1 Rich: 3. cap. 2. the Subjects of the Realm ſhall not be charged with ſuch charge or impoſition called Benevolence, which tendeth to the ſubverſion of the Law, and deſtruction of Commonalty, as appears in the Preamble (where any ſuch charge.) And that ſuch exaction before taken, under the name of Benevolence, ſhall not be drawn into exam-

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ample to make ſuch or the like charge, but ſhall be damned and annulled for ever: But it appears by the Preamble, that this was againſt the will and liberty of the Subject, but free-will offering is not reſtrained.

An. 6 H. 7. The King declared in Parliament, that he had juſt cauſe of War againſt the French King, which for the cauſes there ſhewn was approved, and for that he deſired a Benevolence towards the maintenance of it; and every one promiſed his helping hand, the which the King greatly commended; and to the intent that the poorer ſort might be ſpared, he demanded it by way of a Benevolence, according to the example of Ed: 4. and publiſhed, that he would by their open hands meaſure their benevolent hearts; and he who gives but a little according to his guilt.

By this means he collected great ſumms of money, with ſome grudge for the extremity ſhewn by the Commiſſioners. 11 H. 7. cap. 20. An Act was made for levying of that Benevolence, according to their aſſent, but only of ſuch as aſſented.

An: 20 H. 7. A Commiſſion to levy what was granted by 11 H. 7.

Stow. 880. Note, that 15 H. 8. a Commiſſion under the great Seal, called a Commiſſion of Anticipation, to collect the Subſidy before the day.

An: 16 H. 8. For War with France, a Benevolence levied by Commiſſion with great Curſes and Imprecations againſt the Council, and with Succeſſe, for it was to levy a ſixth part of the value in money or Plate againſt the good will of the Subject.

An: 26 H. 8. Another Benevolence levied by Commiſſion for maintenance of War againſt France, with ill ſucceſſe, for it was exacted of the Subject againſt his good will. But if the Subjects of their free will, without any compulſion, will give to the King for publick uſes any ſumms of money, this is not prohibited by any Statute.

And the Statute 11 H. 7. cap. 18. proves this, where the Parliament compels them who have freely granted any thing to the King for publick uſe, to pay it.

Feb An: 40 Eliz. It was reſolved by all the Juſtices and Barons, that a free Grant to the Queen without coertion is lawfull, and accordingly they granted to the Queen, Quod nota bene, quia, &c.

Paſch. 12 Jac. Regis.

The Caſe of Durgannon in Ireland; The caſe of the new Corporation of Dungannon in Ireland, was in effect, Scil. That the King conſtituted the Town of Dungannon to be a free Borough, Et ulterius volumus, declaramus & ſtatuimus, quod inhabitantes villæ prædictæ ſint unum corpus corporatum per nomen Præpoſiti, 12. Burgenſium & Communitatis Dungannon, & per idem nomen placitare poſſint: Et quod ipſi prædicti Præpoſiti & Burgenſes & ſucceſſores ſui habeant poteſtatem eligendidnos Burgenſes, &c. ad Parliamentum, &c. And the doubt was, whether this Grant of Election of Burgeſſes of Parliament was good, for becauſe it was granted but to parcel of the body, ſcil. To the Provoſt and Burgeſſes, and not to the Provoſt, Burgeſſes and Commonalty: And the chief Baron thought, that foraſmuch as this was not but a nomination or election, it was ſufficient to make the Provoſt and Burgeſſes only to have it: And he took a diverſity betwixt nomination and other inheritance: but this was

denied

denied by all the Juſtices and Barons, for this power to elect Burgeſſes, is an Inheritance of which the Provoſt and Burgeſſes are not capable, for that it ought to be veſted in the entire Corporation, ſcil. Provoſt, Burgeſſes, and Commonalty: And it ſeemed to Hubbard, chief Juſtice of the Common Pleas, that the King may grant to the Inhabitants of Iſlington to be a free Borough; and that the Burgeſſes of the ſame Town may elect two Burgeſſes to Parliament: And that it ſhall be good, although that the Burgeſſes be not incorporated, for there are many Burgeſſes who elect Burgeſſes to the Parliament, which are not incorporate: But it was reſolved by all, that ſuch a Grant made by the King ſhould be void; for the Inhabitants have not capacity to take an Inheritance, as in the 15 Ed. 4. to have Common: And Littleton ſaith in his Chap. of Mortgage, that the Burroughs which ſend Burgeſſes to Parliament, were the moſt ancient and principle Cities, &c. So that it ſhall be intended, that at the firſt they were incorporate. Alſo, Plus valet ſæpenumero vulgaris conſuetudo, quam Regalis conceſſio. *Plowd. 160.*

But it was reſolved by Hubbard, Fanfield, Altham, Winch, Nicols, and Haughton, Quod volumus, was a good word of Grant, as Pigot was of opinion, 21 E. 4. And this ſhall be an implied Grant to all the Corporation, that the Provoſt and Burgeſſes ſhall elect, &c. And regularly, when the Grant is indefinite, ſcil. Firſt, Concedimus an uncertain thing, Et alterius quod Præpoſitus, & Burgenſes, & Succeſſores ſui eligerint, this ſhall be within the firſt Concedimus to all the body, which that party ſhall chooſe: But the chief Juſtice of England, and Doderidge thought the contrary, for in this caſe there was but an Ordinance to erect the Corporation; and no grant altogether to any perſon, ſo that this clauſe, Et quod, &c. is idle and vain.

And note, all the new Corporations were of the ſame form, and in none of them is any clauſe to elect new Burgeſſes, ſo that when thoſe of the modern Burgeſſes dye, this power to elect Burgeſſes is gone.

Mich. 12 Jac. Regis.

A Queſtion was moved to the chief Baron, and the Juſtices at Serjeants Inne in Chancery Lane; That if a Felon be convict either by verdict or confeſſion, if immediatly by his Conviction, his Goods and Chattels be forfeited: And it was ſaid, that if the Felon after his conviction pray his Clergy, that then clearly he ſhall forfeit his Goods and Chattels, for Quodammodo this is a flight, becauſe he refuſeth to be adjudged by the Common Law, and flies to the privilege of the holy Church. But it was reſolved by the chief Baron and the Juſtices, that immediatly by his conviction his Goods and Chattels are forfeited; and the praying of his Clergy is not any forfeiture, for then in caſe where he cannot have his Clergy, he forfeits nothing untill his Attainder, which none will affirm. And with this agrees Stamford, fol. 192. a. where he ſaies, that the Goods of a Felon are forfeited, which he hath the day of the verdict given; and this is proved alſo by the Statute of 1 R. 3. where it is admitted, that the Goods of a Felon convict are forfeited and may be ſeiſed. And of the ſame opinion was the chief Juſtice, and the Juſtices of Serjeants in Fleetſtreet, vid; Trin: 41 Eliz: 332.

Mich. 12 Jac. Regis.

Anne Hungates Caſe in Cam. ſtell.

IN this very Term a great Caſe was heard and determined in the Star Chamber, between Sir Henry Day, who dyed pendent the Bill, and Anne his Wife, and Nicolas Bedingfield Eſquire, and Elizabeth his Wife, Plaintiffs: And Anne Hungate Widow. Sir Robert Wind, Henry Branthwait Eſquire, Thomas Townſend Eſq; Thomas Blomfield Gent. and George Min Gent. Defendants, and the Caſe in effect was; That Henry Hogan Eſquire, being ſeiſed of the Mannor of Hamonds, and of divers Lands of Eaſt Bradenham, &c. in the County of Norfolk in Fee, by Deed made a Feoffment of them to the uſe of the ſaid Anne who took Hungate to Husband, and She had Iſſue by him a Son and a Daughter, and he died: And Anne obtained a Grant of the Wardſhip of the Son, and after when the Son was of the age of one and twenty years, ſaving ſix weeks; By Dedimus poteſtatem, directed to Sir Robert Wind, Henry Branthwait then Feodary, and Thomas Townſend, they took Cognizance of a Fine of the ſaid Son, being then of the age aforeſaid, and ſick: And the Bill charged them all with practiſe in procuring the ſaid Son to acknowledge the Fine; they all knowing that the ſaid Son was within age, and in Ward of the King in Cuſtody of the ſaid Anne: But there was not any practiſe or circumvention uſed by any of the Defendants to procure the ſaid Son to acknowledge the ſame, but the Son of his own good will levied it. And by Indenture the uſe was limited to his Mother, the ſaid Anne, and her Heirs with power of revocation by the Son upon tender of ten ſhillings, &c. and this was in conſideration, that the Mother had paid the Debts of his Father to a very great value, and had obtained the Wardſhip of him, and that her Joynture ſhould be confirmed; And that his Mother, if ſhe pleaſed, might give it to his Brother which ſhe had by Hungate, who was of half blood; And it appeared that the Mother knew the Son to be within age, but the Commiſſioners, for any thing that was proved, were ignorant of it, nor did they ſend for the Book of the Church, in which his age appeared, being in the ſame Parish.

And the Counſel for the Plaintiff prayed, that the Defendants ſhould be puniſhed for their miſdemeanor; and that the ſaid Women being Plaintiffs, who were Coſins, &c. Heirs to the ſaid Son, of the entire blood, who ſhould be diſinherited by the ſaid Fine. To which it was reſolved by the two chief Juſtices, and the chief Baron, that there was not any crime puniſhable by the Law in this caſe: For the Judges of Law, and of this Court may puniſh ſuch Offences and Crimes as are determinable in this Court: But the Judges cannot create Offences, nor do as Hannibal did, to make his way over the Alpes, when he could find none, for Judicandum enim legibus, & ubi non eſt lex, nec eſt tranſgreſſio: And for this, when the Infant levied the Fine, if it be not reverſed during his minority, the Fine is unavoidable in Law, and the Heirs of the Infant have not any remedy by the Law to reverſe it, the cauſe is for this, that the age of the Infant is not to be tried but by inſpection of his perſon: Non teſtium teſtimonio, non juratorum veredicto, ſed judicis inſpectione ſolummodo: But the Judges as by adjuncula, may inform themſelves by Witneſſes,

Church

Church Books, &c. And the reaſon of it is, that the Fine ſhould otherwiſe as well loſe its effect as its name, for Dicitur finis ab effectu, quia finē litibus imponit. And if Infancy ſhould be tryed otherwiſe then by inſpection, no man ſhould be ſure of his Inheritance; for after the death of the Cognizor, aberment may be made many years after; That the Cognizor was within age at the time of the Fine; and ſo many Records avoided by naked aberments, which ſhould be againſt Law, and the cauſe of great vexation and ſuit, and Fitz. N. B. fol. 21. If an Infant levy Fine, he ſhall have a Writ of Error during his non-age, and aſſign it for Error; and this is Error of the Court in Law, and ſhall be tried by the Judges of Law.

And for this it was reſolved by the ſaid Juſtices, That foraſmuch as no corruption and circumvention was proved in the Commiſſioners, or in any of the parties, of which they may be indicted at the Suit of the King, or puniſhed in this Court, but the Fine ſhall ſtand.

And it was not apparant to the Commiſſioners that he was within age, foraſmuch as he wanted but ſix weeks of his full age, but if the Commiſſioners had knowledge that he was within age, then this had been miſdemeanor in them: For it was ſaid, that Fines and Recoveries are like to the Poles Artique and Antartique, for upon thoſe aſſurances of lives depends; for which by naked aberment they annot be ſhaken or impeached, for which divers notable Preſidents have been concerning the matter in queſtion in this Court.

And for this in this Court, Mich. 24, & 25 Eliz. 14. between William Cavendiſh and Anne his Wife, one of the Co-heirs of Henry Knightley, againſt Robert Worſley, and Katharine Lanter Co-heir, and Trafford, and other Defendants, And the Caſe was, That Robert Worſley and Katharine his Wife being within age acknowledged a note of a Fine before Trafford, and another of the Defendants, by Dedimus Poteſtatem: And the Decree ſaid, that the Commiſſioners did perfectly know that the ſaid Katharine was within age, And for this cauſe every one of them was fined, but the Fine ſtands.

Mich. 38, & 39 Eliz. In this Court one Alexander Gilderbrand being ſeiſed of certain Lands in Windham, in Com. Norf. in Fee, one Hubbard procured one Roger who was in his Cuſtody in his houſe, to take upon him the name of Alexander Gildebrand who was then beyond the Seas, to acknowledge a Fine to the ſaid Hubbard of the ſaid Lands, and they were fined in this Court; And it was part of the Sentence, that if he did not re-aſſure the Land to the ſaid Alexander, he ſhould forfeit a greater Fine to the Queen: But there was no Sentence to draw the Fine off from the File, nor Damages awarded to the ſaid Alexander, who was the party grieved.

Mich. 12 Jac. Regis.

Mansfields Caſe.

AN. 23 Eliz. In the Court of Wards, the Caſe was this; That Henry Bushley ſeiſed in Fee of certain Lands in North Mims in the County of Hertford, by his Will in writing demiſed the ſaid Lands to Henry Bushley his Son in taile, the remainder to one William Bushley.

And

And for this, that his Son was within age, he demised the Education of him to Thomas Harrison, whom he made his Executor: And after wards it happned, that Henry the Son became a monstrous and deformed Cripple, and proved an Idiot a nativitate; The which Idiot by the practice of one Nicols and others, was ravished and taken out of the Custody of his Guardian, and was carried upon mens shoulders to a place unknown, and there kept in secret, untill he had acknowledged a Fine of his Lands to one Bothome, before Justice Southcot An: 9. Reg. Eliz. and by Indenture betwixt them, the use of the said Fine was declared to the use of the Cognizee and his Heirs, which Bothome, An: 12 Eliz. conveyed the said Land to one Henry Mansfield: And An: 22 Eliz. the said Henry Bushley the Son, by inquisition was found an Idiot a Nativitate; and upon this in An: 33 the Court of Wards took order for the possession of the said Lands, Vide Calvers Case in my Reports.

And it was moved as a doubt in the said Court of Wards, whether the said Fine should be to the use of the said Idiot and his Heirs; for notwithstanding that the Fine which is of Record binds the Idiot for the causes aforesaid, yet the Indentures are not sufficient to direct the uses: But it was resolved, that forasmuch as he was enabled by the Fine as to the Principle, he shall not be disabled to limit the uses which are but accessory.

And the same is the Law of an Infant and Feme Covert. And the said Mansfield brought an Action of Trespasse in the Common Pleas against one Trott, the Farmer of the said Lands; and the Issue was to be tried at the Bar: And the said deformed Idiot, was sent out of the Court of Wards, to be shewn to the Judges of the Common Pleas, and to the Jurors there tried and sworn; And being brought upon a mans shoulders, the Judges hearing that the Title of Mansfield was under the said Fine levied by that Idiot: The Lord Dyer, and the Court by consent of parties, caused a Jurour to be withdrawn; And the Lord Dyer said, that the Judge who took the Fine, was never worthy to take another; but notwithstanding this, and although the monstrous deformity and idiocy of Bushley was apparant and visible, yet the Fine stood good.

Mich. 12 Jac.

Warcombe and Carrels Case.

20. OCt. 6 Eliz. in the Star Chamber, where were present Sir Nicolas Bacon Knight, Keeper of the great Seal, the Marquesse of Northampton, the Earl of Westmerland, the Earl of Sussex, the Earl of Leicester, Lord Clynton, high Admirall, Lord Strange, and Hunsden, Progers Knight, Controller of the Houshold, Sir Francis Knols, Secretary, Sir William Peeters, Sir John Mason, Sir Richard Sackvil, under Treasurer of the Exchequer, Sir Robert Catlin, Master of the Rolls, Sir James Dyer, Justice del Banc. The Case was, That Edward Carrell, an Apprentice of the Laws, for a great summ of mony bought the Wardship of Johan, Daughter and Heir of Malmcomb, of the County of Hereford, and married her to Edward Carrell, his youngest Son; And after

ter Hil: An: 5 Eliz. the ſaid Johan fell ſick, and being of the age of nineteen years, and not having any iſſue, the ſaid Edward her Husband perſwaded her to acknowledge a fine of her Inheritance, by which ſhould be conveyed an Eſtate to the Husband & Wife in tail, the remainder to the right Heirs of the Wife: And Cognizans was taken by Dedimus poteſtatem directed to Sir Tho: Saunders, and one Chelnell of Grayes-Inne before Baker, divers Judges being here who might have examined her: And on Friday in Eaſter week ſhe died, but the Fine and Pargent du Roigne, was entered as of the laſt Term, Scil. The Tearm of St. Hilary four daies before the death of the Wife.

And the Originall Writ of Covenant bore teſte 15. Jan. returnable craſtino Pur. and the Dedimus poteſtatem 18. die Jan. And James Warcomb Coſin and Heir of the ſaid Johan, complained by Bill againſt Edward Carrell for obtaining of the ſaid Fine by indirect practiſe; And thereupon the ſentence of the Honourable Court enſued thus.

This day a right honourable preſence being aſſembled in this Court, the matter depending in the ſame, between James Warcomb Eſquire, Complainant, and Edward Carrell of London Gent. Defendant, as well for and concerning the validity of the fine levied by the ſaid Edward Carrell, and Johan his late Wife of certain Mannors, &c. of the Inheritance of the ſaid Johan, which Johan, as the Plaintiff doth alledge, was not of full age at the time of the Fine levied; as alſo for certain ſiniſter and undue means committed and done by the ſaid Edward Carrell, in the ſuing and getting out of the ſaid Fine, as is ſuppoſed and alledged by the ſaid Complainant, was by great and long diliberation heard and examined, with all the allegations and ſayings, that could be alledged and ſaid on both parts.

Upon hearing of which matter the ſaid Fine was by the whole opinion of the Court adjudged good, available and effectuall in the Law.

And alſo no fault adjudged to be in the ſaid Edward Carrell, in the ſuing and getting out of the ſaid Fine, but that the ſame was duely and orderly ſued out, according to the due form and order of the Lawes of this Realm. And all this is within the Rule, Facta tenent multa, quæ fieri prohibentur: And the Heir hath Damnum abſque injuria, for the Law doth not give him any remedy to reverſe it. And as Edward Carrell was not puniſhed, although that he knew that his Wife was within age; ſo the ſaid Hungate ſhall not be puniſhed, although that ſhe knew that her Son was within age, and that the rather, by reaſon of the ancient Verſe.

Leges communes ſi neſcit fœmina, miles,
Clericus, & Cultor, Judex ſibi parcet & ultor.

And by ſentence all were diſmiſſed, &c.

Amongſt the Records in the Treaſury, Et inter placita coram Domino Rege de termino Sancti Mich: An: 42 Ed: 3. Rot: 27.

Cornubia Helena filia Hugonis Allot, brought an appeal of Robbery againſt Laurence Boskoſleake, Richard Cohorta: Jo: Gilmin, and Johan his Wife, and divers others; the Defendants plead, not guilty, &c. and were found not guilty of the Felony aforeſaid, Nec unquam ſe ſubtraxerunt, ideo prædictus Laurentius & omnes alij, &c. eunt inde quieti: Et prædicta Elena pro falſa appello ſuo committitur priſons in Cuſtodia Mareſcalli Ric. de Inworeh, Mareſcalli, &c. Et ſuper

per hoc prædictus Laurentius & alij petunt juxta formam ſtatuti, quod Juratores hoc inquirant quæ damna prædictus Laurentius & alij ſuſtinuerunt occaſione falſi appelli prædicti: Et ſi prædicta Helena ſit ſufficiens ad damna ſolvenda: Et ſuper hoc quæſitum eſt a præfatis Juratoribus quæ damna prædictus Laurentius & alij ſuſtinuerunt ſingulatim occaſione prædicta. Qui dicunt quod prædictus Laurentius ſuſtinuit damna ad valentiam 10 l. Et Richardus Cohorta ad valentiam 10 l. & Johannes Gilman 5 l. & Johanna uxor dicti Johannis Gilman 5 l. & ſic ſingulatim de cæteris: Quæſitum eſt ſi prædicta Helena ſit ſufficiens ad aliqua damna ſolvenda. Qui dicunt, quod non. Quæſitum quis vel qui abbettavit vel abbetaverunt præfatam Helenam ad appellationem prædictam proſequendam, Qui dicunt, quod Johannes Riddel ſenior, Johannes Riddel junior, Tho. Drury & Alicia Allet abbetaverunt præfatam Helenam, ideo ipſi diſtringuantur ſecundum formam ſtatuti ad reſpondendum, &c. Out of which Record theſe things are to be obſerved.

1. Although it is enacted by the Statute of Weſt. 2. cap. 21. That in this caſe Juſticiarij, &c. puniant appellatorem per priſonam unius Anni, &c, and according to the Court committed to priſon, &c. ſo that they were not bailable, yet Quia eadem Helena prægnans fuit & in periculo mortis, She was let out upon Main-priſe to have her body, 15. Mich. ad ſatisfaciendum prædicto Laurentio & alijs de damnis ſingulatim adjudicatis occaſione prædicta: And the reaſon of this is, for this, that the Common Law requires in every caſe convenience, and it is inconvenient that a woman with Child ſhould remain in common Gaol Sub ſalva & arcta cuſtodia, where women cannot reſort to her upon times as neceſſity ſhall require, forthwith for convenience, and principlely where it is for avoiding the danger of death, the Court hath power to put her Main-priſe untill ſhe be delivered, for it ought to be a truth concerning the Judges of the Common Law, which the Poet hath ſpoken, Reddere perſonæ ſcit convenientia cuique: And with it agrees that advice which Bracton gives to the Judges, lib. 2. cap. 2: Conſiderent Judices efficaciter quid opportuerit ſecundum neceſſitatem, quid expedierit ſecundum utilitatem, quid ligatum, fuit ſecundum permiſſionem, & quid deceat ſecundum honeſtatem.

2. That the Defendants recover their damages either wholly againſt the Principle, or wholly againſt the Abettors, and not part againſt the one and part againſt the other; and that the Record is Quæſitum eſt ſi prædicta Helena eſt ſufficiens ad aliqua damna ſolvenda: And with this tis agreed in 8 Ed. 4. 3.

3. Although that the Statute ſaith, Reſtituant Appellatores damna Appellatis, yet the damages ſhall be ſingulatim aſſeſſed, for that the words are further, Secundum diſcretionem Juſticiariorum habito reſpectu ad priſonam vel areſtationem, &c. So that foraſmuch as the cauſes of damages are ſever al, as the defamation, &c. of the one may be greater then of the other, and the damages of the one may be greater then of the other.

4. That although that the Appellor be not ſufficient for to pay, yet his body ſhall be taken ad ſatisfaciendum, Quia qui non habet in ære, luet in Corpore.

5. That although that Jurors in the appeal have found the Defendants Abettors, yet inſomuch as they are ſtrangers to the Originall, they ſhall not be condemned, for they ſhall be diſtrained ad reſpondendum: And to that they may plead not guilty, or other plea; Quia res inter alios actæ alteri nocere non debent.

Vide the Book of Entries Title Appeal, diviſione damagers 1, & 2. And this doth appear alſo by the ſaid Statute which ſayes, that Si Abettor convictus

convictus sit de hujusmodi Abettat. per malitiam puniatur per prisonam & tenetur ad restitutionem damnorum faciandam.

Placita coram Rege apud Ebor in Crastino Sancti Trin. An. 7 Ed. 3. 44. Divisione Inditiments are very worthy of observation; The effect of one Inditiment was, Quod ubi quidem Robertus de Bayons de Tunelby captus fuit & in prisona Castri London detentus pro quodam debito statuti mercatorij in Custodia Thomæ Botelier Constabularij Castri de London ubi ipse Thomas le Botelier posuit ipsum Robertum in profundo Gaolo, inter Leones & vili prisona contra formam statuti, &c. viz. de 1 Ed. 3. Et eodem profundo detinuit quousque idem Robertus fecit finem cum eo de 40 s. quos ei solvit & hoc per exactionem.

Dures per Gaoler.

ITem Presentant, That one Wellingoner was arrested for Trespalle at the Suit of James Cantelope, and detained in the said Goal the said Thomas for forty shillings. Ad largum ire permisit: Idem Wallingoner ire non potuit quousque finem fecit cum Roberto de Barton Clerico de dimidio Marcæ quod ei solvit & ulterius pro ferris.

Item presentant, That one John Aylmer of Digby purchased of Thomas Lord of Bardolfe, one Wellinge, &c. Ibi venit Magister Clericus Escheatoris colore officij sui, & absque aliqua causa dictam terram seisivit in manus Domini Regis, & noluit ipsum Johannem permittere terram suam prædictam quousque idem Johannes finem fecisset cum prædicto Magistro Roberto pro 40 s. quos cepit per extortionem & nullo modum sua ammovit.

Item presentant, quod ubi Thomas Balivus Wapentachiæ de Flaxwell & Laughton, tenet Wapentachiam suam super proclamationem, & illa proclamatio debet fieri solenniter in villa de Lasford & Kirkby, super quam proclamationem homines Wapentachiæ possent pervenire ibi: Prædictus Tho: non fecit proclamationes suas, per quod homines patriæ amerciati sunt graviter, & hujusmodi amerciamenta de ijs levata fuerint & hoc per extortionem: To which he appeared and pleaded not guilty, and was found guilty, and fined and imprisoned.

Item presentant, quod Thomas de Maudon Balivus Wapentachiæ de Boby & Graston, tenere debuisset 2. Wappentachia in diversis locis ad sectamentum patriæ prout de jure deberet. Idem Thomas tenebat unam Wapentachiam in uno loco, ad maximum dampnum populi Wapentachiæ prædictæ, & homines eorundem Wapentachiarum nimis excessive fuerint amerciati.

Item Thomas Carleton under Sheriff of the County of Lincoln, was indicted for this, that one Bartholl. de Burgrave purchased a Writt against Nicholas de Nottingham, and delivered the said Writt to the said Sheriff, who returned a Tarde upon the said Writt, although the said Writt was sufficiently in time delivered. Et sic fecit iterum, &c.

Item Hugo de Baxter Latro notorius indictatus de felonia non fuit repertus habilis & quod malæ famæ existit.

IN an Action ſur le Caſe, it was reſolved per totam Curiam, that if a Sumner return one certified upon his Oath in Court Chriſtian, where in truth he was not, and he is pronounced Contumax, and after he is excommunicate, he ſhall have an Action ſur le Caſe, for here is Injuria & damnum; And in ſuch caſe the Plaintiff ſhall have Judgment to recover, for although that the proceeding and Oath touching this matter are Eccleſiaſticall, yet the damage is temporall, for he is diſabled to ſue in any Court.

And it was reſolved, that Perjury, by which Damages doe accrue, may be puniſhed as a miſdemeanor at the ſuit of the King.

And alſo the party may have his Action upon the Caſe to recover Damages, for it ſhould be a very great defect in the Law, and encouragement to the parties, if men may commit Perjury with impunity: And for that reaſon, if Jurors uſe Perjury themſelves, an Attaint lyeth at the Common Law, for ſo it appears by Glanvil, lib:2.cap: 29. 15 H:8. title Attaint 75. 6 H, 3. ib. 73, & 75. and in the time of Ed:1. Attaint 70. for the firſt Act which gave the attaint, the Statute of Weſt:1.cap:38.vid.F:N.B:109.vid: 2.7 H.6 29. one who was to be a pledge affirmed upon his Oath, that he could diſpend forty ſhillings per annum, and upon re-examination he confeſſed it falſe, for which he was committed to the Fleet untill he made a Fine, which proves that the falſe Oath was the wrong and injury, and puniſhable by the Law, Et ex conſequenti, when Damage follows to the party, he ſhall have remedy by Action upon the caſe.

In like manner it was agreed, that if one make a falſe Affidavit by which the party is arreſted and moleſted by proceſſe of contempt, he may have an action ſur le caſe, and recover damages. And although that when the matter is meer Eccleſiaſticall, the Court Chriſtian may puniſh Pro ſalute animæ, yet they cannot award any damages to the party, for if one within holy Order be beaten, they may proceed againſt the Delinquent Pro ſalute animæ, but the Prieſt ought to recover his damages by action of Battery. Notwithſtanding that they may puniſh the ſaid Sumner in the caſe at the Bar, for Perjury and falſe certificate, yet the party grieved ſhall recover his Damages at the Common Law: And although the matter be meerly Eccleſiaſticall, yet if the party grieved hath damages, either by any wrongfull proceedings of the Judge, or Miſ-feaſans, or non-feaſans, or Folly of any Miniſter, or by unjuſt proſecution of the party, the party grieved may have an action ſur le caſe, and recover his damages.

Doctor and Student 118, 119. Action ſur le caſe, lyeth againſt the Ordinary, for a wrongfull excommunication touching any thing out of his Juriſdiction, ſo there many other good caſes: And the caſe in Fitz: 47 H:6.8. If an Arch-deacon refuſe to induct the Clerk, &c. he ſhall have an action upon the caſe, which was affirmed for good Law by all the Court, with which agrees 26 H:8 3.a. and true it is, that it is held in 38 H: 6. 14. That in ſuch caſe he ſhall have remedy againſt the Arch-deacon to puniſh him; but leving the opinion there, they cannot award him damages in ſuch caſe, but he ſhall recover them at the Common Law: So F:N:B:92. If a man proceed againſt a Prohibition, the party may have an Action upon the Caſe againſt him for proſecuting in Court Chriſtian, vide Trin:20 Ed:3. Rot: 46. in the Treaſury: Richard Treſils Caſe, there he recovered Damages againſt the Biſhop of Norwich, by him excommunicated after Prohibition, Epiſcopus adjudicatur eſſe illicitum expugnatorem Authoritatis Regiæ, & querens receperavit decem mille libras, ſimile Paſch:13 Ed:3 Rot:78. Philip

de

de Hardeſhals caſe, Hil. 32 Ed. 3. Rot: 78. Sir Tho: Seaton Knight, recovered againſt Lucy who was the Wife of Robert Cockſide, for ſuing to Rome, pro tranſgreſſione facta per ipſum Thomam, pro captione bonorum & catallorum ſuorum & pro debitis, & inde pronuntiari fecit ſententiam excommunicationis, &c. he recovered by Verdict Damages to three thouſand pound, &c. Trin: 37 Ed: 1. Coſts were recovered againſt the Arch-biſhop of Canterbury, forty pound pro damnis, per quod ipſum excommunicavit pro executione brevis Regis pro manu fortia amovenda. Ideo Epiſcopus capt. Mich: 29 Ed: 3. Rot: 19. ſimiliter: And divers other Records you may ſee in my Book of Preſidents.

Paſch. 14 Jac.

A Habeas Corpus to the Marſhall of the Admiralty granted in Hil. Term laſt paſt, for Haukeridge, Priſoner in the cuſtody of the ſaid Marſhall, who did return, Quædam cauſa ſpolij, &c. contra Haukeridge pendet indeciſa pro judicio & ſententia paratus ſit, &c. Qui quidem Will: Haukeridge ſic commiſſus remanet donec ante dicta Cauſa per præfatum Daniel Dun fuerit, Et hoc eſt cauſa. And alſo upon another Habeas Corpus, he made ſuch a return, and otherwiſe parata ſit, &c. which the Court took to be very inſufficient, and gave divers dates to amend the return, and to ſhew the cauſe of delay, and for why ſentence was not given, foraſmuch as Sententia fuit parata, or otherwiſe a man may be in perpetuall Priſon: And the Marſhall would not amend his return, upon which the party being in Priſon ſixteen or eighteen weeks, alwaies the return was eſt parata, &c. ſo the cauſe was long Parata ad judicium, ſed nunquam judicata: And after in another Mich. returnable Craſtino Aſcentionis, was another return of Parata, &c. without ſhewing cauſe of delay: Alſo it ſeems the return was inſufficient for another cauſe, Viz. Quædam cauſa ſpolij civilis & maritima quæ coram, &c, which is two generall for two cauſes.

1. For that (Spolij) is uncertain, and ought to be ſpecified in ſome more certainty of what things, or of, or in what things in particular, and does not ſhew any value of the Goods.

2. That Maritima eſt ſuper littus, or in portu maris, for thoſe appertain or are next to the Sea, and yet the Admirall hath not Juriſdiction Super littus maris or in portu, for that they are Infra corpus Comitatus, as appears in many Books and Records. And ſo it was adjudged in Lacies caſe, that Infra the high water mark, and low water mark, when the Sea is at an Ebb, it is within the body of the County, Dyer, 15 Eliz. the Abbot of Ranſeyes caſe, yet this is Maritima, 15 Eliz: Dyer, fol: 326. Paſch: 17 Eliz. in Scaccario ac contra Diggs, for which cauſe he ought to have ſaid, Super altum mare, infra juriſdictionem Admiralli, for the Statutes of 13 R: 2. cap: 5. 2 H: 4. cap: 11: 19 H: 6, 7. confine him only ſuper altum mare: And the Return which concerns the Impriſonment of the body ought to be certain.

But for the firſt, all the Court reſolved, that it was inſufficient: Alſo there was ſhewn no time of the ſpoyl; and for this, in the ſame Term, for the inſufficiency of the Return which the Court could not obtain to be amended; the ſaid Haukeridge was bailed in open Court untill the next

Term: Alſo the words are Quædam cauſa ſpolij ac civilis ac maricina, vid: 28 H:8. cap: 15. that upon an inſufficient return the party ought to be bailed or diſcharged, all our Books and infinite Preſidents are, vide 6 H: 6. 44. otherwiſe if the Return ſhall be ſufficient when it is faln. And note the proceeding was Civiliter, for to have reſtitution, & non Criminaliter.

Note, that it was ſaid by ſome, that when Judgment is given, that one ſhall be hanged untill he be dead; the King cannot alter the Judgment, and command that he ſhall be beheaded, for that the execution ought to be conform to the Judgment: and with this accords 35 H 6. fol: 58. & Stamford lib:1.fol:13. vide 27 Aſſ.pl:41. vid: F: N: B: 144. where it ſeems that he may be beheaded, 22 Aſſ:pl:49. One was beheaded for killing of Adam Walcam, the Kings Meſſenger, which is there taken for petit Treaſon. But when one is attaint of Treaſon, his judgment is to be hanged by the neck, and cut down alive, and his Entrails and privy members cut off from his body, and burnt in his ſight, his head to be cut off, his body to be divided into four parts, and diſpoſed of at the Kings will, ſo that in ſuch caſe the King may pardon all the execution, but Decapitation, for this is parcell of the Judgment; and the King may pardon all or any part at his pleaſure: And it was reſolved that the Duke of Summerſet, foraſmuch as his Judgment was to be hanged by the neck, could not be beheaded, for that would alter the Judgment. And ſo it was reſolved in the caſe of the Lord Stutton in the time of Queen Mary, and of the Lord Dacres in the time of H:8, both which were hanged for Felony.

It was reſolved alſo, that King H:8. could not by the Law behead his Wives for treaſon, for Judicandum eſt legibus, non exemplis.

And note, that when a Noble man is attaint of Treaſon, and hath his Judgment as is aforeſaid, the courſe is, that the King makes his Letters Patents directed to the Lord Chancellor of England, reciting the Attainder; yet we minding to diſpence with that manner of execution of Judgment, in reſpect that the ſaid A.B. is a Noble man, do therfore by theſe preſents remit and releaſe the ſaid A.B. of and from ſuch execution of judgment; and in ſtead therof, our pleaſure is, to have the head of the ſaid A. B. cut off &c. as in ſuch caſes hath been uſed, touching or concerning Noble men: And by the ſame do require the Lord Chancellor to make two Writs under the great Seal, one to the Lieutenant to deliver the ſaid Priſoner, and the other to the Sheriff of London, to receive and execute the ſaid Priſoner, &c. And the caſe of the Lord Sanchez was ſtronger, for that he was not Noble within England, &c.

Trin. 9 Jac. Regis.

IN this very Term, I moved the Juſtices in Serjeants Inne in Fleet-ſtreet, upon the Statute An:7 Jac:cap:6. which gave power to two Juſtices of Peace, to require any perſon or perſons, &c. and in ſome caſes one Juſtice of Peace only, If the Juſtices of Peace may make a ſpecial Warrant to Conſtables, &c. to have the bodies of parties, who are to take the Oath according to the Statute before them. And it was reſolved by all una voce, that they may, and that for two reaſons:

1. When the Statute gave power to Juſtices of Peace to require any perſon or perſons, &c. to take the Oath, the Law implicite gave them power

er to make a Warrant to have the body before them, for Quando lex aliquid alicui concedit, conceditur & id ſine quo res ipſa eſſe non poteſt.

2. It is againſt the Offices of the Juſtices, and of the authority given them by the Statute, that they ſhall go and ſeek the parties: And principally in a caſe of ſo great conſequence. Then I moved, if in ſuch caſe the Conſtables may break the houſes of the parties named in their Warrants: And it ſeemed to us all that they cannot, for that they are not any Offenders untill they refuſe to take the Oath before them who have authority to tender it to them, or commit ſome contempt to the King: And inſomuch as they are not yet Offenders, nor are indicted, nor charged by any matter of Record, their houſes cannot be broken by Warrant made by conſtruction upon the Statute, by which authority is given, &c. to require them to take the Oath, vide Statute 7 Jac: and ſee in it, that Baron and Baroneſſes, as to the tender of the Oath, need not to be indicted, &c. for theſe words, Of or above the ſaid age or degree, are to be intended of the ſaid age, and above the ſaid degree, or otherwiſe the firſt clauſe concerning Barons ſhould bridle, vide thoſe who have power to tender the Oath to them of the Nobility, have power to commit them upon refuſall to the Common Goal, by the generall Act; and if any perſon or perſons being of the age of eighteen years, or above, ſhall refuſe to take the ſaid Oath duly tendred &c. which clauſe extends to all before.

Note, if the perſon be fugitive in another County, he evades the Statute for the preſent; but he may be indicted for recuſancy, and the Indictment may be removed into the Kings Bench, and they may make proceſſe againſt them in any County of England: Alſo if they are in their houſes the doors being ſhut, &c. then they may be indicted either before the Juſtices of Aſſiſe, or before the Juſtices of Peace at the quarter Seſſions, and then after a Venire facias, &c. by force of a Capias, their houſes may be broken by the Sheriff, vide Statute 10 Eliz. cap: 2. (to which the Statute of 23 Eliz: refers, &c.) ſuch proceſſe is given in caſe of not repairing to Church &c. as in Indictment of Treſpaſſe which is Ven: fac: Cap: &c.

Memorandum Hil. Term 9 Jac: all the Juſtices of England by commandment of the King, ſignified by the Lord Chancellor were aſſembled to have conſideration of theſe two Statutes. And in the beginning of this Term, the ſaid points were recited and debated, and after good conſideration ſeverally, and conference had altogether: It was reſolved by all, That if one be indicted for Recuſancy, the Court may proceed by proceſſe upon the Statute of 23 Eliz. or by proclamation according to the Statute of 28 Eliz: And that the proceſſe upon the Indictment for Recuſancy, and Ven: fac: Capias, &c. which is the proceſſe in Indictment of Treſpaſſe; and upon the Cap: the Sheriff upon requeſt firſt made to open the Door, according to the reſolution in Seymans Caſe, and when the Sheriff brought him into Court, he may upon refuſall of taking his Oath be generally indicted as before Juſtices of Aſſiſe, or in open Seſſions of the Peace upon refuſall before them: But the Juſtices upon the ſecond day of conference, did not ſpeak to the other point. And after this reſolution was reported to the Lords of the privy Council at Whitehall, in the preſence of all the Juſtices of England, the ſeventh day of Feb: in Termin. ſancti, Hil: 9. Regis, and the Lord Chancellor deſired that we ſhould put our reſolutions in writing; To which I anſwered, that the Judges never uſed to put their reſolutions in writing, but that if the Attorney or Solicitor come to us (as the ancient uſe hath been to our Predeceſſors) we will deliver our opinions to them again Ore tenus, but not in writing.

At

At the third day of the conference in this very Term, it ſeemed upon the Statute 3 Jac: if Juſtices of Peace upon refuſall before them, commit any perſon to Gaol without Bail or Main-prize, and mention in their Warrant the tender and refuſall, then the Juſtices of Aſſiſes, or Juſtices of Peace ought to tender the Oath again, and to have a ſpeciall Indictment; for the words of the Act 3 Jac: are, And if the ſaid perſon or perſons, or any other whatſoever, &c. ſo that this word (other) excludes the perſons who were committed for refuſall. But it ſeems if the Mittimus of the Juſtices of Peace, &c. do not comprehend any tender and refuſall of the Oath, then they may be generally indicted, as upon refuſall in open Court, for the Court cannot take notice of tender and refuſall in ſuch caſe: And it was reſolved, that the Major number of the Juſtices of Peace who commit the parties, have election to commit either to the next Aſſiſes, or the next Seſſions; for the words of the Statute being in the Diſjunctive, ſome may be more apt to be committed untill the next Aſſiſes, and ſome untill the next Seſſions: And it is to be obſerved, that two Juſtices, of which the one is to be of the Quorum, by the Statute 7 Jac: may commit any perſon above the age of eighteen, and under the degree of Nobility, although that he be not indicted, nor convict, &c. But a Juſtice of Peace cannot commit any unleſſe they be proſecuted, indicted, or convicted, &c. according to the Statute 7 Jac: And it was reſolved by all, That if the Indictment be commenced upon the Statute 3 Jac: upon refuſall in open Court, the Indictment may be ſhort and generall, of what the parties are indicted, &c. And not ſo if the Indictment be upon the Commitment made by two Juſtices of Peace; this is good of any perſon whatſoever: but in ſuch Caſe if the Mittimus be eſpeciall, comprehending the tender of the Oath and refuſall, there ought to be a ſpeciall Indictment and refuſall in open Court. Alſo if the Juſtice of Peace make a ſpeciall Mittimus, then the Indictment ought to be ſpeciall, ſcil. To recite that the party was indicted or preſented, &c. in certain, according to the Statute of 7 Jac: And that he refuſed before one Juſtice of Peace, or otherwiſe in open Court; but if the Mittimus be generall, as is aforeſaid, then the Indictment before Juſtices of Aſſiſe at the Aſſiſes, or Juſtices of Peace at the Seſſions of Peace may be generall upon the Statute 3 Jac.

Mich. 10 Jac. Regis.

The Earl of Northamptons Caſe.

The Attorney-generall informed againſt Thomas Gooderick Gentleman, Sir Richard Cox Knight, Henry Vernon Gentleman, Henry Minors Serjeant of the Waggons, Thomas Lake Gent. and James Ingrum Merchant, Ore tenus in the Star Chamber, the laſt day of the Star Chamber, and charged Gooderick that he had ſpoken and publiſhed of the Earl of Northampton, one of the Grandees and Peers of the Realm, one of the Kings priby Councill, Lord priby Seal, and Lord Guardian of the Cinque-ports, divers falſe and horrible Scandals, ſcil. That more Jeſuites, Papiſts, &c. have come into England, ſince the Earl of Northampton was Guardian of the Cinque-ports then before.

2. That the ſaid Earl had writ a Book openly againſt Garnet, &c. but ſecretly

ſecretly he had writ a Letter to Bellarmine, intimating that he writ the ſaid Book Ad placandum Regem ſive ad faciendum populum, and requeſted that his Book might not be anſwered; and that the Arch-biſhop of Canterbury had certified it to the King, and that the ſaid Gooderick did relate it to one Deusbury, a Batchelor in Divinity, who had acquainted the ſaid Earl with it. Gooderick being examined, confeſſed the words ſpoken; but to extenuate his offence ſaid, that he was not the firſt Founder: And he vouched the ſaid Sir Richard Cox, who confeſſed that he related to Gooderick the matter concerning the book of the Earl, & his letter to Bellarmine, but not the words concerning the Cinque-ports: And that the Arch-biſhop of Canterbury had informed the King of it, to the intent that the Earl of Northampton ſhould not be Lord Treaſurer; and to extenuate his Offence, he vouched the ſaid Vernon, who upon examination confeſſed that which Richard Cox had publiſhed, but that he was not the firſt Author, but he cited the ſaid Lake, who did likewiſe confeſſe what Vernon had ſaid, but that he heard it from Serjeant Nicols, who being examined confeſſed it. And withall, that one Speaker related it to him, and that he had heard it from one James Ingrum, and James Ingrum being examined confeſſed the words concerning the ſaid Book of the Earl, and of the Letter to Bellarmine: And that in the month of October, he heard the ſaid words of two Engliſh Fugitives at Ligorne, and never did publiſh them untill the death of the Earl of Salisbury, Treaſurer, who dyed in May laſt: And all the ſaid Defendants confeſſed at the Bar, all that with which they were charged: And at the hearing of this Caſe were ſieven Judges of Law. Fleming Juſtice being abſent Propter ægritudinem.

And ſo it was reſolved, that the publiſhing of falſe rumors, either concerning the King, or of the high Grandees of the Realm, was in ſome caſes puniſhable by the Common Law: But of this were divers opinions.

1. Touching the matter and quality of the words.
2. Touching the perſons of whom they are ſpoke.
3. The manner of contrivance, or publiſhing of them.
4. Touching the puniſhment, for which cauſe divers Acts have made declaration, and have put things in certainty.

And firſt of all, as to the words or rumors themſelves.

1. They ought to be falſe and horrible.

2. Of which diſcord or ſlander may ariſe betwixt the King and his people, or the Grandees of the Realm, Weſt. 2. cap: 24. or between the Lords and Commons, 2 R: 2: cap: 53. by which great perill and miſchief may come to all the Realm, ibidem.

3. The ſubverſion and deſtruction of the Realm, ibidem. And for this the ſaid Act of 2 R: 2. againſt rumors, falſe and horrible Meſſages.

2. As to perſons, they are declared to be Prelates, Dukes, Earls, Barons, and other Nobles and Grandees of the Realm, and alſo of the Chancellor, Treaſurer, Clerk of the privy Seal, Steward of the houſhold of our Soveraign Lord the King, Juſtice of the one Bench, and of the other, or of any the great Officers of the Realm, ut 2 R: 2. cap: 5. and the King is contained within the Act of Weſt: 1. cap: 34. as appears in Dyer 5 Mar: 155.

3. As to the third point it was reſolved, that if one hear ſuch falſe and

horrible rumors either of the King, or of any of the ſaid Grandees, it is not lawfull for him to relate to others, that he hath heard I: S: to ſay ſuch falſe and horrible words; for if it ſhould be lawfull, by this means they may be publiſhed generally, &c. And this doth appear by the ſaid Statutes, viz. That the party ſhall be impriſoned untill he find out the party who ſpoke them, which proves that it was an offence, or otherwiſe he ſhould not be puniſhed for it by Fine (for this is implied) and Impriſonment.

It was alſo reſolved, that the Offenders at the Bar, if againſt them the proceedings, had been by Indictm. upon theſe Statutes, no Judgment could be had againſt them that they ſhould be impriſoned untill they found their Author: For for example, Gooderick did not relate to Deusbury that he heard from Sir Richard Cox, but he related the ſaid words as of himſelf; And for this no Judgment can be given againſt him, that he ſhall be impriſoned untill he find his Author; for this, that he ought to be indicted for the words which he himſelf did ſpeak, and then, De non apparentibus & non exiſtentibus eadem eſt ratio, When the Indictment is generall without any relation to a certain Author, the Judgment, which alwaies ought to be given of matter apparant within the Record, cannot be that he ſhall be impriſoned untill he hath found his Author.

And it was reſolved, that if A. ſay to B. Did you not hear that C. is guilty of Treaſon, &c. this is tantamount to a ſcandalous publication: And in a private Action for ſlander of a common perſon, if I: S: publiſh that he hath heard I:N: ſay, that I:G: was a Traytor or Theef; in an Action of the Caſe, if the truth be ſuch, he may juſtifie: But if I: S: publiſh,

That he hath heard generally without a certain Author, that I:G: was a Traytor or Theef, there an Action ſur le caſe lyeth againſt I.S: for this, that he hath not given to the party agrieved any cauſe of Action againſt any, but againſt himſelf who publiſhed the words, although that in truth he might hear them, for otherwiſe this might tend to a great ſlander of an Innocent, for if one who hath Læſam Phantiſiem, or who is a Drunkard, or of no eſtimation ſpeak ſcandalous words, if it ſhould be lawfull for a man of credit to report them generally, that he hath heard ſcandalous words, without mentioning of his Author, that would give greater colour & probability that the words were true in reſpect of the credit of the Reporter, then if the Author himſelf ſhould be mentioned, for the reputation and good name of every man, is dear and precious to him: And a Record was vouched in Mich. 33 & 34 Ed: and in the 30. Aſſ. pl: 10. and in the Exchequer Mich: 18 Ed: 1. Rot: 4.

Note, that all the Commiſſions of Oyer and Terminer give authority to enquire De illicitis verborum placitationibus, vide le Stat: 5 R: 2. cap: 8. & 17 R: 2. cap: 8. concerning Rumors, and in 3 Ed: 2. in the Exchequer, Henry Bray ſpoke of John Foxley Baron of the Exchequer: It was reſolved, that the Judgment in an Indictment upon the ſaid Statutes, when the words are ſpoken generally, without relation to a certain Author, is, that the Offender ſhall be fined and impriſoned, for this is implied and included in the ſaid Statutes, as an incident to the offence, although that it is not expreſſed. Alſo the party grieved may have an Action de ſcandalo Magnatum, and recover his damages: Alſo the party grieved and the Kings Attorney, if the Offenders deny it, may exhibite a Bill in the Star-Chamber againſt the Offender, in which the King ſhall have a Fine, and the party ſhall be impriſoned, and the Court of Star-Chamber may inflict corporal puniſhment, as to ſtand upon the Pillory, and to have papers about his head.

And

And if the Offenders confeſſe it, then to proceed Ore tenus upon their own confeſſion; and for the publication of the ſaid words, all the Defendants were puniſhed by all the preſence, una voce nullo contradicente by Fines and Impriſonment: And Gooderick and Ingrum were fined the moſt, for that Goodrick had no author for the words concerning the Cinque Ports, nor could Ingrum find any Author for to vouch, that he heard by perſons unknown at Lygorne in forraign parts; and therfore it was taken as a fiction of his own.

Trin. 10 Jac.

Eaſtwicks Caſe in Curia Wardorum.

KIng Philip and Queen Mary by their Letters Patents De gratia ſpeciali & ex certa ſcientia & mero motu, &c. granted to Aringal Wade in Fee, the Farm or Grange called Milton Grange in Com. Bedford, parcel of the poſſeſſions of the late diſſolved Monaſtery of Wooborne, Tenendum prædictam firmam ſive Grangium de nobis & ſucceſſoribus noſtris, ut de Manerio noſtro, de Eaſt Greenwick, in Com: Kantiæ in capite per ſervitium viciſimæ partis unius Feodi militis pro omnibus reddicibus, ſervitijs, exactionibus & demandis quibuſcunque, which Grange by mean conveyance came to Chriſtopher Eaſtwick, after whoſe death the Tenure was found verbatim, according to the words of the Patent. And the queſtion was, if the Tenure was by a Mean, as of the ſaid Honour, or in Capite; And their principle reaſon was, that the Letters Patents of the King, ſhall be conſtrued according to the Kings intention expreſſed in his Charter: And in this caſe of neceſſity ſome words ought to be rejected, ſcil. theſe words (in Capite) and then the ſence will be, Tenendum de nobis &c. ut de Manerio noſtro de Eaſt Greenwick in Com. Kantiæ per ſervitium viceſimæ partis unius feodi militis, &c. or theſe words, De Mannerio noſtro de Eaſt Greenwick in Com. Kantiæ, and then the ſenſe will be Tenendum de nobis, &c. in capite per viceſimam partem unius Feodi militis, &c. for both together cannot ſtand; and then the better ſhall be taken for the King, as in 5 Mariæ, Dyer 162. Tenure of the King, Per ſervitium militare, is to be intended Tenure in Capite: So Tenure de quo vel quibus & per quæ ſervitia ignorant. is Tenure in Capite, for the beſt ſhall be taken for the King, 15 vide H:7.7.14 Ed:4,5. & 3 H:7. 12.9 H.7.9.6. per Huſſey 13 H:7.4 per Fineax, 19 H:8. title Office Brook 58. action.

Another reaſon was added, that if theſe words, in Capite, ſhall be rejected, then the words enſuing, ſcil. per ſervitium viceſimæ partis unius Feodi militis, &c. ſhall be rejected here; and then the Tenure will be by one entire Fee of a Knight, for words in the middle of a Sentence may be extracted: And as well the conſequent as the precedent ſtand: But it was anſwered and reſolved, that the ſaid Grange was held of the King as of the Honour, and not in Capite: And the reaſon was for this, that Tenure of the King in Capite, is as much as to ſay, Tenure in Groſſe, or of the perſon of the King: And for this, that the chief and principall part of the body of the Tenure of the perſon of the King is ſaid in Capite. And it appears by ancient Records, that in ancient time all Tenures in Groſſe, or

of

of the perſon of a Subject were called Tenures in Capite; as in Clauſ: 9 H:3.membr:28 Robertus filius Madock tenuit terram de Thoma Corbet in Capite: And in the ſame manner you ſhall find by many other Records, Lands to be held of Subjects in Capite, which we call Tenure of the perſon or in Groſſe, but of late time Dicitur de Rege ſolummodo, terras teneri in Capite: When it is as much as to ſay, Tenendum de nobis, &c. ut de Manerio noſtro de Eaſt Greenwich in Groſſe, ut de perſona noſtra, which is againſt the nature of a Tenure in Groſſe, or of the perſon when the Land is expreſly limitted to be holden of a Manor, &c. And for this, if the ſaid words ſhould be tranſported, ſcil, Tenendum de nobis in Capite ut de Manerio noſtro de Eaſt Greenwich, &c. this will not alter the Caſe, for when in the beginning or end the Land is expreſly limitted to be held Ut de Manerio, the Tenure of the perſon is abundant, or it may have this ſence, that the King is Caput totius Regni: And for this, inaſmuch as it is limited to hold of the King, who is chief, it may be vulgarly ſaid, that the Tenure is in chief, inaſmuch as it is of the King as of a Manor.

And as to the ſecond Objection; it was reſolved, That the abundant words ſhall be extended in Conſtruction of the Law, and not the words ſubſequent, which doth limit the Term in certainty: And with this reſolution in the principall point agrees Mich: 17, & 18 Eliz: 345. where it was found that Owen ap David was ſeiſed of certain Land in Fee held of the Queen, as of the Principality of Wales in Cap: And it was held Per Concilium Curiæ, no Tenure in Capite; and ſo (as it was ſaid) it was reſolved in the time H:8. in Baron Lukes Caſe, where Lands were granted by the King to hold of him as of his Honour of Huntington, in Capite, that this was a mean Tenure, and not in Capite.

Nota, That a Tenure of any ancient Honours, as of Rawleigh, Hagenet, and Peverell, are by uſage and allowance in all ages taken for to have the effect of a Tenure in Capite, ſcil. To have all the Lands in Guard, &c. Et non valet ratio contra experimentum, vide le Stat: de Magna Charta, cap: 31. and the 11 H:7. in Rot: Parliamenti not Printed, and 1 H:6.cap:4. vide Bracton, lib:2.fol:87.30 H:8.Dyer 8.58.29 H:8.Brook, title Livery 28.57.5 Ed:3.5.

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